TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 227.

W. S. HUNNICUT, G. W. BARNES, ET AL., PLAINTIFFS IN ERROR,

vs.

BALIE PEYTON, SALLIE B. PARKER, ET AL.

CERTIORARI AND RETURN.

FILED SEPTEMBER 12, 1878.

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Interrogatory second. What is your age?

Interrogatory third. Were you or not, at any time, a surveyor? If yea, how long and when and where did you engage in such profession?

2 How much experience have you had as a surveyor in said State of Texas, and when and where in particular have you been so engaged in said State?

Interrogatory fourth. Do you know anything of the locations or boundaries of what is generally known as the "Reserve" in Austin and William's Colony in said State? If yea, state all you know, giving the source of your information or knowledge, going to show the true location or situation of the upper and the lower line of so much of said "reserve" as lay east of the Brazos River. When and by whom were said lines run or located? Where was said upper line located?

Interrogatory fifth. Have you or not, at any time or times, had any experience as a surveyor within said "reserve"? If yea, when and where in said "reserve" had you such experience, and what other surveyor or surveyors, if any, were with you at such time or times, place or places?

Interrogatory sixth. Did you or not ever know one William Moore? If yea, when and where did you first know him? Was he or was he not a surveyor? Is he now living or dead? If living, where does he live; if dead, when and where did he die?

3 Interrogatory seventh. State whether or not you ever personally knew Jonathan C. Peyton. If yea, when and where did you first know him? Where did he live? Is he now living or dead? If living, where does he live; if dead, when and where did he die?

Interrogatory eighth. Do you, or not, know anything of the location of four leagues of land granted to Gregorio Basquez, a part of his concession of eleven leagues, situated in Falls County, said State, on the east bank of the Brazos River? If yea, state all you know concerning the actual location or situation of said four leagues of land; and please state, as accurately as you can, all the observations, measurements, surveys or calculations made by you on, about, or in the neighborhood of said four-league survey—if any you have ever made—which enable you to state where the same is actually located.

Interrogatory ninth. Do you know when and by whom, if by any one, said four leagues was surveyed, and for whom it was surveyed? If yea, answer fully, stating where the upper line of the said Basquez four-league survey began; the course and bearing of said line, giving, as nearly as you can, the number of degrees east or west of north or east or west of south.

4 Interrogatory tenth. State, if you know—giving your means or source of information or knowledge—what the location of the upper line of the said Basquez four league is with reference to the upper line of the said "reserve." Are any of the lines of the said four-league survey concurrent, coincident or identical with any of the lines of said reserve? If yea, which one of them, and with what line of the "reserve" and to what extent is it so concurrent, coincident or identical?

Interrogatory eleventh. Were you or not ever engaged with the said Moore in making surveys within said "reserve"? If yea, when, and in what part of said "reserve," and for what purpose were said surveys made?

Interrogatory twelfth. Was or was not the said Moore directing and superintending the surveys being made within the "reserve" at the time? If yea, state wheather or not you were directed by him to make

a number of surveys, of a given number of varas front each, along the east bank of the Brazos River, stating, if such directions were given, where you began your surveys, the number of varas front in each, and the number of varas intervening between your place of beginning and where you stopped; stating whether you laid off all of said surveys as directed or stopped before their completion. And if you stopped, how far short of the point to which you were to run did you stop, and why did you so stop?

Interrogatory thirteenth. Between what two points within the reserve were you to lay off the surveys referred to in the preceding interrogatory?

Interrogatory fourteenth. Do you or not know anything of the Francisco Ruiz four-league survey, situated in Robertson County? If yea, state where its lower line begins, what course it runs, and its bearings, giving the number of degrees east or west of north, or the number of degrees east or west of south. What is the location of said lower line, with reference to the "reserve" lower line?

Interrogatory fifteenth. Do you or not know whether the upper line of the said Ruiz survey was ever ascertained by an actual survey? If yea, when, and by whom?

Interrogatory sixteenth. State, if you can, the relative positions of the Basquez and Ruiz four-league surveys; the width of each from the upper to the lower line, in varas, and the distance in varas between the two surveys.

6 Interrogatory seventeenth. What is the length, and what the width, in varas, of said "reserve"?

Interrogatory eighteenth. State what was the course and the bearings of the upper and lower lines of said reserve, if you know, and the course and bearings of the upper and lower lines of the smaller surveys, fronting the Brazos, within the reserve, made by you. State whether or not said lines are parallel with the said upper and lower lines of the reserve.

Interrogatory nineteenth. Did you ever, at any time or times, place or places, in any conversation or conversations, with the said William Moore, hear him speak of the said Basquez four-league survey; where its location or situation is with reference to the upper line of said reserve; whether the lower line of said survey was ever run; by whom run, and where, giving course and direction; the width of said survey, or any other particulars in regard thereto? If yea, state what he said, and at what time and place.

Interrogatory twentieth. Did you know any of the surveyors, or the chain-carriers in Austin and Williams' colony? If yea, which of them, stating their names and place of residence, if living; and if dead, when and where they died?

7 Interrogatory twenty-first. This is a suit brought by the plaintiffs, in the title of these interrogatories named, against the defendants there named, for the recovery of the said Basquez four leagues. Do you know any other matters or things touching the lands in question, in this cause, which may tend to the benefit or advantage of either party? If yea, set forth the same and all the circumstances and particulars thereof, fully and at large, as if you had been thereto particularly interrogated.

STOCKDALE & PROCTOR,
PEELER, MONTGOMERY & FISHER,
Attorneys for Plaintiffs.

8 Cross-interrogatories:

W. S. Hunnicut, Clement R. Johns, Flavius Everett, and W. Von Rosenberg, by their attorneys Terrell & Walker, reserving all exceptions to the manner and form of propounding the interrogatories in chief, propound the following cross-interrogatories to the said Horatio Chriesman, viz:

Cross-int. 1st. If you were ever a surveyor connected with Austin & Williams' colonial enterprize in what is known as the "reserve," please state the character of your connection with the same fully, with reference to time, and your authority as surveyor connected with surveys in said reserve.

Cross-int. 2d. Please state who was the principal surveyor and the names of the surveyors who were subordinate to him in surveying said "reserve" in Austin & Williams' colony, and whether, after the survey and location of said reserve, you possessed any authority in regard to making surveys within said reserve, east of the Brazos River? If so, state fully your authority, when it existed, and what you did in pursuance of your power; state fully.

Cross-int. 3d. Give your means of knowledge as to the location of the upper line of said reserve east of the Brazos River;
9 was it actually run, to your personal knowledge, or was its place of crossing the Brazos River determined by the labor surveys?

Cross-int. 4. State if you kept a record of field notes of surveys made by you or your authority within said reserve, and made a map of the same. If yea, what did you do with them or it?

Cross-int. 5. If the William Moore, about whom you were questioned in interrogatory in chief No. 6, ever made surveys within the said "reserve," under whose authority did he make them? Were they ever plotted and field-notes of same preserved? If so, what was done with said plots or field-notes, and were the same made under your authority?

Cross-int. 6th. Do you know anything of a book now preserved as an archive in the general land-office of Texas, marked "Horatio Chriesman's field-book of surveys in the reserve east of the Brazos, 1834." If so, state what you know of said book, and how it came (if you know) in the general land-office?

Cross-int. 7th. State as well as you can what surveys the said William Moore made under your authority or otherwise east of the
10 Brazos, within said reserve, and where the record of his said work can be found?

Cross-int. 8th. Were the upper and lower lines of the "reserve," east of the Brazos River, actually surveyed within your personal knowledge? Where was the beginning, and how was the survey made on the east, and how on the west of the Brazos River? If you have said the reserve line was determined for each side of the Brazos River by different surveyors, state whether a connecting survey was made to show that the upper reserve line on the east side of the river was a continuation of the line as established on the west side? State also if whether the "reserve" line on the east side of the Brazos River was determined by means of the four labor surveys made along the east bank of the Brazos River, or by meandering the river, or by running the eastern line of the "reserve."

Cross-int. 9th. When and where did you last see the old map of the reserve compiled and plotted by you?

Cross-int. 10th. Do you know anything of the representation on the old maps of the said "reserve," of about two thousand varas space, between the upper line of the Basquez four leagues survey and the

11 upper line of said "reserve"? Explain why the maps show this 2,000 varas space?

Cross-int. 11th. If you say Wm. Moore surveyed the four labor surveys fronting on the east of the Brazos River within the "reserve," and the surveys back of the same, state whether you revised his field-notes, and adopted them, and why the field-notes of the Basquez four leagues grant was not returned to you, together with the field-notes of Moore's work in the reserve, although the maps show the Basquez adjoining to the other surveys made in the reserve?

Cross-int. 12. State whether the Basquez survey was ever map'ed under your direction, and what connection was made to map the same, since the Basquez field-notes call for no other survey by which its being map'ed adjoining could be explained? If you state it was map'ed adjoining the uppermost of the four labor surveys made in the "reserve" fronting the Brazos, state why it was so map'ed, and on what authority.

Cross-int. 13th. State why the field-notes of the Basquez survey are not in your book of surveys in the "reserve" east of the Brazos River?

12 Cross int. 14th. If you have in your possession or there shall be exhibited to you at the time of answering these interrogatories any map, please attach the same to your answers, and in your answer to this refer to and state the fact that you have done so, for identification, and write your name on said map; after stating the fact that you have complied with this request, then please state whether said map correctly represents the location of said reserve and the surveys within the same? If the map is not correct, state in what particular, and explain why it was so made.

TERRELL AND WALKER,
Att'ys for Hunnicut, Johns, Everett, & Von Rosenberg.

13 In the circuit court of the United States for the fifth circuit and western district of Texas.

BALIE PEYTON ET AL. *vs.* W. S. HUNNICUTT ET AL } No. 1552.

Cross interrogatories propounded to Horatio Chriesman by the defendants, W. S. Hunnicutt, Sarah K. Bartlett, A. E. Watson, Irene M. Watson, Carrie Watson, and C. A. Watson.

Cross to the 4th direct interrogatory. Do you know from your own knowledge that the upper reserve line on the east side of the Brazos River was ever actually run? Did you ever see said line? State how far the same is from the Falls of the Brazos. If you say you knew the location of said line by any other means than actual observation on the ground, please state fully and particularly your means of information and knowledge. Would you not think that maps made by Surveyor Moore, at the time, would correctly represent the lines of that and other surveys in the near vicinity made by him?

Cross to 8th direct. If you say you knew anything about the actual location of the Basquez 4 league survey, please state particularly

14 and fully your means of information and knowledge. If you have knowledge of the same from information of others, state the name of your informant, with time and place and attending circumstances. Were any persons present but you and him? Who were they? Where

are they now? State the very language of your informant, if you can. Is your memory clear and distinct in regard to acts, events, and language, seen and heard by you at that early period? Are not the field works of you and Moore and maps accompanying better evidence of the actual situation, conformation, and location of lines and surveys made by you and him, and their relative position and connection with each other, than your memory now can possibly be; and should not your memory, where it is variant, be corrected by them? Did you ever return to the land office a field book of surveys made by you on the east side of the Brazos River within the reserve? If you did, does not that book with its accompanying map represent correctly the observations, measurements, surveys, or calculations made by you, on, about, or in the neighborhood of said surveys? Is not that field book with its map a correct delineation of the work done by you, and of the location and situation of adjoining surveys above and below? If not, why not?

15 State the particular instances in which they are wrong, and give your reasons for saying that they are wrong.

Cross to 10th direct. Please examine the map shown you, and say whether it is a correct copy of your work and map referred to. Can you say now that any of the lines of said 4 league survey are concurrent, coincident, or identical with any of the lines of said reserve?

Cross to 12th direct. Please examine the map referred to in the last above interrogatory, and say wheather it correctly represents the beginning point of the surveys mentioned in the 12th direct interrogatory, the number of varas front of each, and the number of varas intervening between your place of beginning and where you stopped.

Cross to 13th direct. Does not the map referred to give a correct answer to this question?

Cross to 16th direct. Do not the said map and field work as contained in your field book show correctly the distance in varas between the Ruiz and Basquez surveys? Are they not the best authority you can have on that point now? If not, why not?

16 Cross to 19th direct. Did you close your work on the lower line of the Basquez? How did you know it was the lower line of that survey? Was it by the discovery of marked lines, or by information? Were not your field work and map based upon actual knowledge of facts existing at the time, or upon information satisfactory to you? If said map and field work were based on and made from information derived by you from Moore, do they not correctly represent the information and directions given you by him? Did you not follow his directions in your work, and did you not delineate that work correctly on your map? If not, why not? And in what particulars does said map fail to represent correctly your work upon the ground? If surveyor Moore or any other competent surveyors were making two important surveys at the same time or nearly the same time, one calling for the other as a boundary line, do you think he or they would be likely in his work upon the ground to lap one over the other? Would you not think that very improbable?

Please annex the map referred to in these cross-interrogatories to your answer, and mark the same so that it may be identified in

17 court, and state how you have marked the same.

THOS. HARRISON,
Att'y for Def'ts.

18 In U. S. circuit court for the fifth circuit and western district of the State of Texas, to January term, A. D. 1875.

BAILIE PEYTON ET AL.
vs.
W. S. HUNICUTT ET AL.

Answers and depositions of Horatio Chreisman, a resident citizen of Burleson County, Texas, to the accompanying interrogatories and cross-interrogatories propounded to him in the above-entitled cause, taken before Thomas M. Hunt, clerk of the district court of Burleson County, Texas, in accordance with the accompanying commission.

To the 1st direct interrogatory he answers: I am a citizen of the
19 State of Texas, residing in the county of Burleson. I arrived the 4th day of June, A. D. 1822, at the mouth of the Colorado River, in what is now the State of Texas. I first settled in what is now Austin County, Texas, about 10 miles above San Felipe, on the west side of the Brazos River.

To the 2nd direct interrogatory he answers: My age is 77 y'rs the 13th day of August, 1874. I was born in Salem, Farquire County, Virginia, on the 13th day of August, 1797.

To the 3rd interrogatory he answers: I was a surveyor for many years; I commenced surveying as a surveyor under General William Rector, surveyor general in Missouri in the fall and winter of 1816, and surveyed about three years under him. I commenced surveying in Texas on the 10th day of Oct., 1823, as principal surveyor for Stephen F. Austin for his first colony—commencing on the Brazos River about four miles below the town of Washington, in what is now Wash-
20 ington County, and for several years I was engaged in surveying in Austin's first colony from the San Antonio road down to the mouth of the Brazos River on both sides of said river. I continued surveying either as principal or deputy surveyor in Austin's different colonies until the annexation of Texas to the United States. Since that time I was appointed surveyor of Burleson County, about the year 1871, and continued in that office about one year.

To the 4th direct interrogatory he answers: In the fall of 1833 I traced a portion of the lower line of said reserve on the east side of the Brazos River, commencing where the said line intersects the river, running with said line N. 71° E., the length of the lower line of the Francisco Ruiz 4 league grant, which was identical with said reserve line.
21 I got my information as to the location of the lower line of the said reserve from Col. F. W. Johnston, William Moore, deputy surveyor, and the citizens living in the vicinity of said line. Said William Moore informed me that he ran the up'er line of the reserve on the east side of the Brazos River; that said line began on the east bank of the Brazos River a short distance below the falls, running N. 71° E. My information was and is that the reserve lines were run by F. W. Johnston and William Moore in or about the year' 1832 and 1833.

To the 5th direct interrogatory he answers: I have had experience as surveyor in said reserve. Some time in the fall of the year 1833 Col. F. W. Johnston, principal surveyor, ordered William Moore and myself to make a survey of a portion of the lands in said reserve on the east side of the Brazos River, beginning at the up'er line of the said Francisco Ruiz 4 league grant, on the east bank of the Brazos River, order-
22 ing me to lay off the front on the river in "4 labor tracts" fronting one thousand (1,000) varas on the river, and running back

for quantity; and these surveys were to include all the river front between the up'er line of the Ruiz and the lower line of the Gregorio Basquez 4 league grants. While I was engaged in surveying the front, said Moore was engaged in surveying the land back, or east of said "4 labor tracts," each covering two of my fronts and connected with them. John H. Money, my deputy, was assisting me in doing this work. We commenced surveying in said reserve about the latter part of October or first part of November, 1833, and stopped work on or about the 8th day of Feb'y, 1834, as per a copy of a portion of my said work certified to by the Commissioner of the General Land Office herewith enclosed with my depositions and marked Exhibit A, which shows the time we left off the work surveying, and I am sure we were en-
23 gaged at it for three months or more. During the progress of our work said Moore and myself frequently met and conversed together on the subject in which we were engaged. Moore & myself left the reserve about the same time.

To the 6th direct interrogatory he answers: I did know William Moore. I first became acquainted with said Moore in the town of San Felipe about the year 1831. He was a surveyor; he is dead; has been dead for many years. He died east of the Brazos; I cannot state the place. To the best of my recollection, he died before the annexation of Texas to the United States.

To the 7th direct interrogatory he answers: I personally knew Johnathan C. Peyton. I first became acquainted with him about the 8th day of June 1822, at the mouth of the Colorado River, Texas. Said Peyton, his wife, Samuel M. Williams (afterwards empresario with
24 Stephen F. Austin), and many others, came over in the same vessel. Afterwards, in 1832, I lived in San Felipe with said Peyton and family, and said Williams. Said Peyton is dead; he died in San Felipe in 1834.

To the 8th direct interrogatory he answers: I know nothing (except from information) of the location of the said 4 leagues of land granted to said Basquez. I will in answer to a subsequent question state all the information I possess on the subject. I made no surveys, measurements or calculations with a view to the location of the said grant.

To the 9th direct interrogatory he answers: During the time that said William Moore and myself were engaged surveying in the said reserve, as before stated, and perhaps before that time, he informed me that he had made the survey of the said 4 leagues Basquez grant; that
25 the upper line of the said grant began on the east bank of the Brazos River at the point where the upper line of the reserve began, and that the upper line of the Basquez ran N. 71° E. with the reserve line the full distance of the Basquez line, and that the upper line of the Basquez and the upper line of the reserve were the same to the extent of the Basquez line.

To the 10th direct interrogatory he answers: This interrogatory is fully answered by my answer to the last interrogatory (9th).

To the 11th interrogatory he answers: I have answered this interrogatory in my answers to previous interrogatories, with the exception of the last clause thereof. The surveys made by Moore and myself, as before stated, were for the purpose of forming a dense and compact settlement on the river.

To the 12th direct interrogatory he answered: The said Moore and myself were each engaged making surveys within the reserve at the time specified, each one having been directed in his surveys by F.
26 W. Johnston. I was directed by said Johnston to make the front

surveys on the east side of the Brazos, to begin said surveys, as before stated, at the upper line of the Ruiz grant and terminate them at the lower line of the Basquez grant. I began the surveys as directed on the upper line of the Ruiz grant, and proceeded to survey the front in "4 labor tracts" fronting 1,000 v'r's on the river and running back for quantity and numbering each tract from 1 to 48. When I had completed tract "No. 48" the said Moore came to my camp and informed me that I was approaching the neighborhood of the lower line of the "4 league Basquez grant." And not knowing where the said line was (nor had I time to hunt it), and being out of provisions, I did not finish the front surveys, but stopped at "No. 48," which according to a map (hereinafter mentioned) left a vacancy of 2,000 v'r's between tract "No. 48" and the lower line of the Basquez grant. I am certain I did not cross Basquez' lower line in making these front surveys; that was what I was particularly guarding against.

To the 13th direct interrogatory he answers: As I have
27 already answered, between the upper line of the Ruiz and the lower line of the Basquez grants.

To the 14th interrogatory he answers: As before stated, I knew the location of the Francisco Ruiz 4 league grant in Robertson County. Its lower line begins on the east bank of the Brazos River, at the point where the lower line of the reserve begins; and runs on the said reserve line N. 71° E. with said line, the full distance of its call, and is located within the reserve. I ran the lines of the said "Ruiz 4 league grant to find its upper boundary in order to commence the front surveys" before mentioned.

To the 15th direct interrogatory he answers: I have answered this question in my last answer.

To the 16th direct interrogatory he answers: The Basquez grant is located on the east side of the Brazos on the upper line of the
28 reserve, as I was informed by William Moore. The Ruiz grant is located in the reserve, on the lower line thereof, on the east bank of the Brazos. The map will show each to be 5,000 v'r's wide and the distance between the two 50,000 v'r's, according to the true map.

To the 17th direct interrogatory he answers: The reserve is 60,000 v'r's in length, and I understand is about 40,000 v'r's in width.

To the 18th direct interrogatory he answers: As hereinbefore stated, the course of the upper and lower lines of the "reserve" on the east side of the Brazos River runs N. 71° E. from the river, and the smaller surveys fronting the Brazos in the "reserve" made by me have their lines parallel with the upper & lower lines of the reserve.

29 To the 19th direct interrogatory he answered: As before answered, I have heard said Moore speak of the Basquez 4 league survey and its location with reference to the upper line of said reserve. I do not recollect the words of Mr. Moore, but he said to me in substance that he had run the "lower line of said grant, its course being the same as the course of the "upper line." The width of the survey is 5,000 v'r's as shown by the map. Moore and I conversed on the subject at the time of making the surveys in the "reserve," and probably at other times.

To the 20th direct interrogatory he answers: I knew several of the surveyors and chain carriers in Austin & Williams' colony. Among the surveyors were F. W. Johnston, William Moore, and John H. Moore, Among the chain carries were William Duty, George Darr, William Isaacs, Isam G. Beecher, and Wright, and others not now recollected. Of all these, Col. Frank M. Johnston and myself are

30 the only survivors, so far as I know and believe. Beecher died in Washington County and Darr in Burleson County. I don't remember where Isaacs died. Wright died in Austin County, and Duty, I think, on the Colorado.

To the 21st direct interrogatory he answers: I know nothing more of matters and things pertaining to this question than what I have stated, except that I know that there were weed prairies on the east side of the Brazos River and near the same. I remember to have shot a deer in one of said weed prairies while I was surveying one of the 4 labor tracts. I am unable to state whether there was timber or prairie at the places where the upper and lower lines of the Basquez grant struck the river, having never been at either of these places.

HORATIO CHREISMAN.

Answers to cross interrogatories propounded by Messrs. Terrell & Walker, attorneys for def'ts Hunnicutt, Johns, Everett, and Von Rosenberg.

31 To the 1st cross-interrogatory he answers: As deputy surveyor, and in obedience to orders from F. W. Johnston, principal surveyor, I made the beforementioned surveys in the said "reserve" at the time stated in my answers to the direct interrogatory.

To the 2nd cross-interrogatory he answers: Frank W. Johnston was principal surveyor of Austin and Williams' colony, and William Moore and myself were his deputies. I took no part in surveying the "reserve," which I understood was made by Johnston & Moore. After the survey and location of the "reserve" I was ordered by F. W. Johnston with William Moore to make a number of surveys within said reserve east of the Brazos River. My authority existed during the time the work was being executed, and what was done by myself and the said William Moore is fully set forth in my answers to the direct interrogatories, to which I refer as my answer to this interrogatory.

32 To the 3rd cross-interrogatory he answers: I have no personal knowledge as to the location of the upper line of said "reserve" east of the Brazos River. I was, as before stated, informed by William Moore that he ran the said line. I am sure that the place of crossing the Brazos River by said "reserve" line (if it were ever extended across the river) was not determined by the labor-surveys in the "reserve," because the labor-surveys were made after the "reserve" survey, and after the survey of the Bosquez Grand.

To the 4th cross-interrogatory he answers: I kept a record of the "*filed* notes" of surveys made by myself, with the assistance of my deputy, John H. Money, within said "reserve," and made a "map" of the same, which I returned to the office of the empresarios, Austin and Williams.

To the 5th cross-interrogatory he answers: The said William
33 Moore made surveys within the said "reserve" under the authority of Frank W. Johnson, and they were plotted, and field notes of the same preserved. His work and mine were connected and plotted together under our joint authority, and were returned to the office of Austin and Williams.

To the 6th cross-interrogatory he answers: I never saw any such book in the Land Office, but I had such a book and filed the same in the office of Austin & Williams in the year 1834; said book was in my handwriting and in the handwriting of my deputy, John H. Money. If the said book is in the Land Office, I do not know how it came there.

To the seventh cross-interrogatory he answers: William Moore made no survey within the reserve under my authority east of the Brazos River. The surveys which he did make in said reserve are, I think, fully set forth in the plat of our joint work previously mentioned,
34 and, as I believe, was filed with my work in the office of the empresarios; but where it is now I cannot tell, unless it be in the General Land Office.

To the 8th cross-interrogatory he answers: I have no personal knowledge of the actual survey of the upper and lower lines of reserve east of the Brazos River, except that I traced the lower line of said reserve from its beginning corner on the east bank of the Brazos River the extent of the distance of the lower line of the Rinz grant, as before stated. I have no personal knowledge as to the beginning of the said surveys on the east and west of the Brazos River further than before stated. I understand that Johnson ran the reserve lines on the west side of the river and Moore on the east side. I do not know whether or not the upper reserve line on the west side was ever extended to the river, or whether it would strike the river opposite to the beginning corner of the upper reserve line on the east bank of the Brazos River. I have
35 no knowledge on this subject. The reserve line on the east side of the Brazos River was not determined by means of the 4 labor-surveys made along the east bank of the said river. I have no knowledge how the beginning corner of the said reserve was determined. The said labor-surveys were made subsequently to the survey of said reserve line.

To the 9th cross-interrogatory he answers: I never saw the old "map" of the reserve nor did I compile or plot any such map. If the interrogatory means to enquire when and where I last saw the plat of the survey made by myself and Moore in the "reserve," it was soon after the completion of the work, early in the year 1834, at San Felipe, about the time it was returned to the office of Austin & Williams.

To the 10th cross-interrogatory he answers: I know nothing of any such representation of the said reserve on the old maps of about
36 2,000 v'r's space between the upper line of the Basquez 4-league survey and the upper line of the said reserve. I never saw any map which shows a space of 2,000 v'r's between the upper line of the Basquez and the said reserve line until I received the certified copy of a map from Austin sent me by Messrs. Terrell & Walker, att'ys for defendants, in which that space of 2,000 v'r's was placed between the upper line of the Basquez and said reserve, and it is impossible for me to explain why this space of 2,000 v's is placed above the upper line of the Basquez instead of below the lower line of the Basquez, where, I am well satisfied, it should be.

To the 11th cross-interrogatory he answers: I do not state that William Moore surveyed the 4 labor-surveys fronting on the east of the Brazos River in the reserve, but that I surveyed the said 4 labor-tracts. Moore's surveys were back of them. I neither revised or adopted Moore's field notes. As to why the field notes of the Basquez 4-league
37 grant were not returned to me, together with the field notes of Moore's work in the reserve, I have to say that the said Basquez survey was made by Moore many months before he and I did said surveying in the reserve as before stated, and he had returned field notes, survey, &c., to the proper authorities, and his field notes of the surveys in the reserve made in connexion with my surveys of the front were returned to the proper officers and not to me.

To the 12th cross-interrogatory he answers: The Basquez survey was

never mapped under my direction, nor had I anything to do with its survey. I do not state that it was mapped adjourning the uppermost of the 4 labor-surveys made in the reserve fronting the Brazos River. On the contrary I state that it was surveyed, mapped, and granted, as the records will show, before the said 4 labor-surveys were made.

38 To the 13th cross-interrogatory he answers: The reason why the field notes of the Basquez survey are not in my book of surveys in the reserve east of the Brazos River, is because I never had anything to do with the said survey or field notes.

To the 14th cross-interrogatory he answers: I have in my possession at this time a copy of a map from the General Land Office, sent me by Messrs. Terrell & Walker, attorneys for defendants in this case, and according to their request attach the same to my answers, and for identification write my name upon the said map; and in answer to said interrogatory state that said map does not correctly represent the location of the said reserve and the surveys within the same. The said map is incorrect in this, that it represents a space of 2,000 v'r's between the upper line of the said Basquez grant and the upper line of the reserve, when that space is and should be placed on the map below the lower

39 line of the said Basquez grant. I cannot explain why the map is so made. I know that I did not so make it. The upper "4 labor tract No. 48," as surveyed by me did not adjourn the Basquez grant, but was 2,000 v'r's below it.

HORATIO CHRIESMAN.

Answers to cross-interrogatories propounded by Thomas Harrison, attorney for defendants Hunnicutt, Bartlett, and Watsons.

To cross to 4th direct interrogatory he answers: I do not know of my own knowledge that the said line was ever actually run. I never saw the said line, nor do I know how far the same is from the falls of the Brazos, but was informed by William Moore, deputy surveyor under F. W. Johnson, that it was a short distance below the said falls. My information relative to the said line was derived from the said Moore, who informed me in the latter part of the year 1833, or the early part of the year

1834, while we were surveying in said reserve on the east side of

40 the Brazos, and perhaps at other times, that he ran the said reserve line east of the Brazos River. I have no further information on the subject than what I was told by the said Moore. I should think that maps made by Surveyor Moore at the time would correctly represent the line of that and other surveys in the near vicinity made by him. The said Moore was a competent, careful and accurate surveyor.

To cross to 8th direct interrogatory he answers: I know nothing of the location of the Basquez 4-league survey but what I derived from the said William Moore. In the fall of 1833, the said Moore and myself were ordered by the principal surveyor, F. W. Johnson, to make a series of small surveys within the said reserve on the east side of the Brazos River, and during the time we were engaged making said surveys the said Moore informed me that he had surveyed the said Bas-

41 ques 4-league grant for Johnathan C. Peyton; that he commenced the upper line of said survey on the east bank of the Brazos River at the point where the reserve line intersected said river, and that he run north 71° E. with said reserve line the full distance called for by the Basquez grant. He then ran south 19° E. 5,000 vrs.; thence S. 71° W. to the Brazos River; thence up the river to the beginning. This conversation took place in the reserve between the time we first com-

menced surueying about the 1st of Nov., 1833, and the 8th day of Feb'y, 1834, when we left off surveying. We had frequent conversations on the subject, generally at my camp. I presume that John H. Money, my deputy surveyor, and my camp hands were present, but they are all dead. Jackson and Kennedy were my chain carriers. After I had completed the fourth survey, No. 48 on the map before referred to, said Moore came to my camp and informed me that I was in the vicinity of the lower line of the Basquez grant. I have stated the words of Moore as near as I am able to do. My memory is clear and distinct in
42 regard to acts, events, and language seen and heard by me at that early period. I think I could find the very place where my camp was pitched at that time. I had found a bee-tree in about 50 or 60 yards from the camp the day before Moore came to me. We cut the bee-tree the day that Moore called to see me and eat of the honey. I think that my memory is more tenacious relative to those ancient matters than those of more recent occurrence, particularly in surveying, as that was the principal occupation of my life. The field work of myself and Moore and accompanying maps (if genuine) I should consider better evidence of the actual situation, conformation and location of lines and surveys made by him and myself and the relative position and connection with each other than my memory or that of any other man where there is any conflict, and my memory, if variant from my said maps and field work, should stand corrected by them, but I should wish to
43 see the original documents and would not trust copies. I never did return to the Land Office a field book of surveys made by me on the east side of the Brazos River in the reserve, but I did return such a book to the empresarios, Austin & Williams, which may have found its way into the general land office. If the identical book which I returned to Austin and Williams be in the general land office, with its accompanying map, it correctly represents the surveys I made in the said reserve on the east side of the Brazos River, including observations, measurements, surveys, or calculations made by me in the reserve below and in the neighborhood of the said Basquez grant. The said field book and map when I last saw them were a correct delineation of the work done by me and of the location and situation of the 1,000 vara front surveys which I made from 1 to No. 48 inclusive, and the surveys made by Moore in the rear or east of my work. But that field book and map did not connect with or show the location, situation or boundaries
44 of the said Basquez 4-league grant, there being a vacant space between the upper line of No. 48 and the lower line of the Basquez of 2,000 varas or thereabouts. The particular instances in which the map referred to in the next interrogatory (which I suppose is the one referred to in the question) is wrong in this, that the vacant space of 2,000 vrs. referred to is placed above the upper line of the said Basquez grant, instead of below the lower line of said grant; but my plat does not show any connection between the 1,000 vara front tract No. 48, and the lower line of the Basquez grant. The Basquez grant appears on the said land office map to have been removed from the reserve line 2,000 vrs. below, so as to adjoin or connect with No. 48, when according to my map there was no connection between the lower line of the Basquez and the said No. 48, and the space should be between the lower line of the Basquez and the upper line of No. 48; and these are the facts and reasons why I think they are wrong.

45 To the cross to 10th *district* interrogatory he answers: There is no map shown to me as contemplated in this interrogatory, and I suppose it was a copy of a map from the land office brought and shown

to me about one month ago by W. S. Hunnicutt, one of the defendants in this case. He also showed me a copy of the interrogatories or cross-interrogateries, which I think are the same as those which I am now answering. I had a full conversation and explanation with Mr. Hunnicutt relative to that map, and he did not leave it, but carried it away with him. I therefore cannot examine the map referred to, or say anything of its contents, except that I remember that it placed the vacant space of 2,000 vrs. or thereabouts above the upper line of the Basquez grant, when it should have been below its lower line. I say now as I heretofore said, that William Moore, deputy surveyor, informed me that the upper line of the said Basquez grant was surveyed by him,
and that the same was identical with the upper line of the re-
46 serve, on the east side of the Brazos River.

To cross to 12th direct interrogatory he answers: There being no such map as that contemplated in this interrogatory, I am unable to answer with reference to the map. The number of varas front of each front survey was 1,000 varas. The number of varas intervening between the place where I began and where I stopped is 48,000 varas.

To cross to 13th direct interrogatory he answers: I cannot say whether the map referred to gives a correct answer to this question or not without seeing the map.

To the cross to the 16th direct interrogatory he answers: The said map and field work as contained in my field book do not show correctly
the distance in varas between the Kinz and the Basquez surveys,
47 because the said map and field book only show the work so far
as I went with it; and I did not reach the lower line of the Basquez in said work, but left a vacant space between my upper survey No. 48 and the lower line of the Basquez grant of 2,000 vrs.

To the cross to the 19th direct interrogatory he answers: I did not close my said work on the lower line of the Basquez grant; I did not find the said lower line, and in fact did not search for it, but after finishing front survey No. 48, I was informed by said William Moore, who surveyed the said Basquez grant, that I was approaching the lower line of said tract. I am sure I had not reached it. My field work and map are based upon actual knowledge of facts existing at the time. I received my instructions from T. W. Johnson, and not from Mr. William Moore. I delineated my work correctly on my map; I do not think
that any competent surveyors making two important surveys, at
48 or near the same time, one calling for the other boundary as a
boundary line, would be likely in their work upon the ground to lap one over the other. I would think such a thing very improbable. I cannot annex the map referred to in these cross-interrogatories, because the said map is not present at the time of answering them.

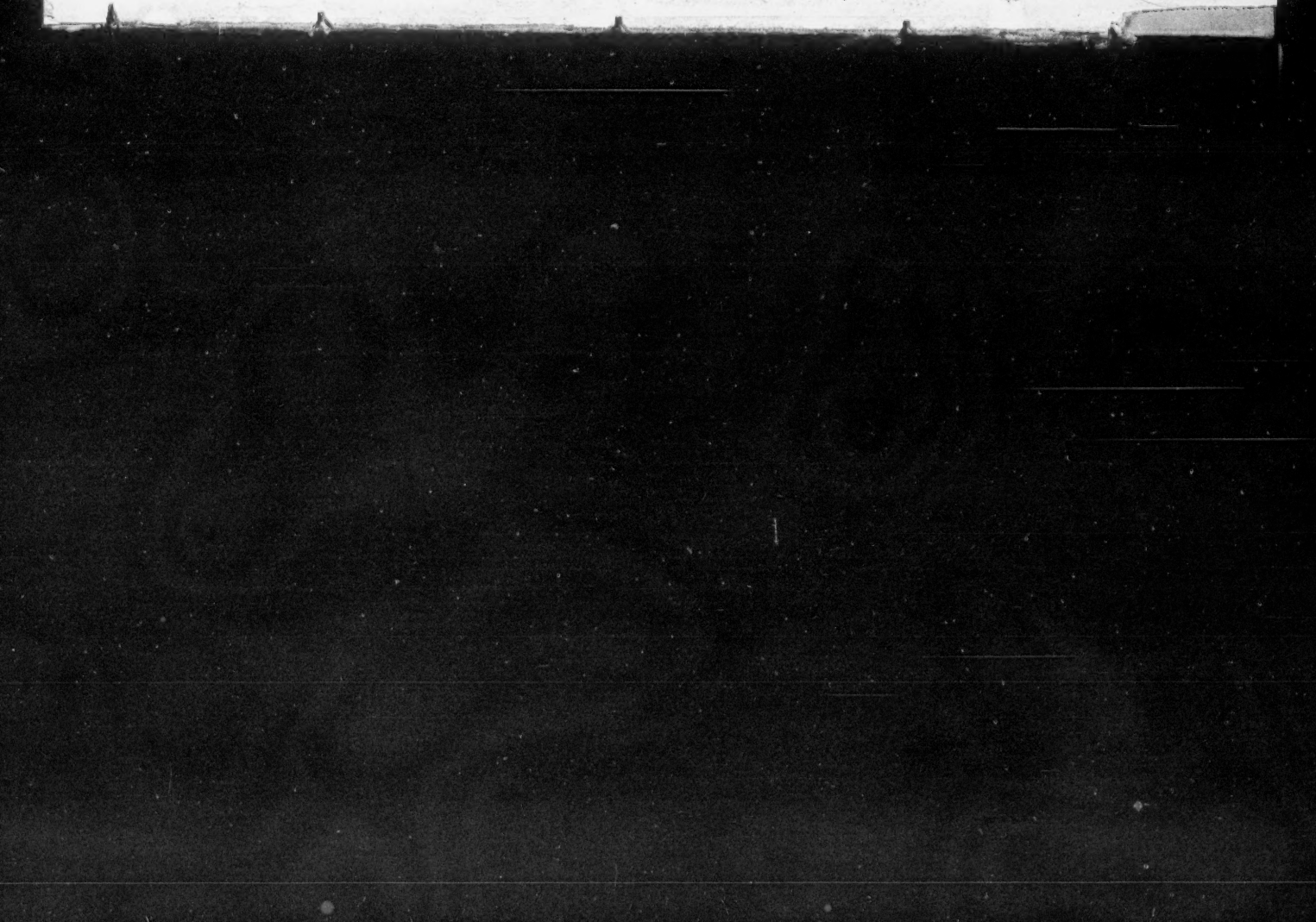
HORATIO CHRIESMAN.

THE STATE OF TEXAS,
County of Burleson:

I, Thomas M. Hunt, clerk of the district court of said county, do hereby certify that the foregoing answers of Horatio Chriesman, the witness before named, were made before me in the said county of Burleson, and were sworn to and subscribed before me by the said witness in the said county.

Given under my hand and official seal at my office in the town of Caldwell, on this the 30th day of January, 1875.

[L. S.] THOMAS M. HUNT,
Clerk District Court, Burleson County, Texas.



49 Costs of the deposition paid by Bailie Peyton, esq., as follows:

To commissioner	20 00
" witness	3 00
	$23 00

Exhibit A referred to in answer to 5th direct interrogatory.

4. Labor tract No. 48, in the reserve east of the Brazos, beginning at the N. W. cor. of No. 47, at a post from which a hackberry 6 in. dia. b'rs N. 61½ E. 8 var's, marked 48, and a cottonwood 10 in. dia. b'rs S. 32 E. 12 var's, marked 47; thence N. 71 E. with the north boundary line of No. 47 at 3760 var's passed the N. E. cor., at 3875 var's set a post for the S. E. cor., from which, &c. (reference to Moor's notes for bearing trees); thence N. 19 W. at 1000 var's set a post for the N. E. cor. (reference to Moor's notes for bearing trees); thence S. 71 W. at 4193 var's intersected the Brazos River, where set a post for the N. W. cor., from which a cottonwood 3 in. dia. b'rs N. 81 E. 4 var's, marked 48, a do. 4 in. dia. b'rs No. 10 E. 20 var's, marked 49; thence down the river with the meanders thereof to the place of beginning.

Feb'y 8th, 1834.

[L. S.]

(Here follows map marked page 49.)

50 EXHIBIT A.

STATE OF TEXAS, GENERAL LAND OFFICE,
Austin, December 16, 1874.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true copy of the original contained in book D, Upper Colony, on the title page of which appears the following: Horatio Chriesman's Field Book of Surveys in the reserve east of the Brazos, 1834, containing notes of 4 labor tracts, Upper Colony, of the permanent records of this office.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land office to be stamped on the day and date last above stated.

[L. S.] J. J. GROOS,
Commissioner.

51 EXHIBIT C.

Eberly to Marlin.

Know all men by these presence that I, Angelina B. Eberly, have constituted & appointed James Marlin my agent & attorney, for me & in my stead to take & hold possession of a certain tract of land situated in Falls County, containing four leagues, or thereabouts, conveyed [surveyed*] by Francis W. Johnson, in the year 1833, for Gregoria Basques, pursuant to an order obtained by Jovathan Peyton, attorney for said Basques, from Luke Lessasier, then alcalde of San Fillipe De Austin, said four-leagues tract being bounded on the north by the Austin &

NOTE.—* In pencil in the original.

Williams reserve line, so called, fronting on the easterly margin of the Brazos River, & extending back 20,220 varas, or thereabouts, preserving a width of five thousand varas, & I, the said Angelina B. Eberly, do hereby put & place him, the said Marlin, in actual possession of the said four-leagues tract, henceforth to hold the same for me & in my stead and behalf.

In testimony whereof I have hereunto set my hand & affix my seal, my scroll being used as such, this 28th day of May, A. D. 1857.

ANGELINA B. EBERLY. [SEAL.]
By ABANEZER ALLEN, *Her Att'y.*

(Endorsed:) Angelina B. Eberly, by Ebenezer Williams, her att'y, to James Marlin. Power of att'y. Certified copy of power of att'y.

THE STATE OF TEXAS,
County of Galveston:

Before me, Oscar Fawsh, clerk of the county court of Galveston County, this day appeared Angelina B. Eberly, per her attorney
52 in fact, Ebanezer Allen, to me known, who acknowledged the within instrument of writing to be her act & deed for the consideration & purposes therein stated.

Given under my hand & seal of said county court this 28th day of May, A. D. 1857.

OSCAR FAWSH, *Clerk.*

I, Sam. D. Barclay, clerk of the county court of Falls County, *County*, certify that the foregoing instrument of writing was filed in my office for record on the 10th day of June, 1857, at 11 o'clock a. m., and was duly correctly recorded by me on this 16th day of June, 1857.

Given under my hand in Marlin the day & year last written.

SAM. D. BARCLAY, *Clerk.*
By SAM. BARNES, *Deputy.*

STATE OF TEXAS,
County of Falls:

I, James M. Hart, clerk of the district court of Falls County, Texas, do hereby certify that the above and foregoing is a true & correct copy of an instrument of writing from Angelina B. Eberly, by her attorney in fact, Ebenezer Allen, and its probate and record, from the records of deeds for Falls County, Texas, as the same now appears in Book D, pages 75 & 76 of said records of deeds.

Witness my hand & official seal of said court at office in Marlin this 30th day of March, A. D. 1875.

JAMES M. HART,
Clk D. C. F. C., Texas.
By WM. O. CHRISTOPHER,
Deputy Clerk.

53 EXHIBIT D.

Eberly to Marlin.

Know all men by these presents that I, Angelina B. Eberly, of the city of Lexington and State of Kentucky, having previously appointed and empowered James Marlin, of Falls County, Texas, as my agent to protect and guard a certain parcel of land lying said county, origi-

nally granted to Gregorio Basques, and subsequently acquired during our marriage by my late husband, Johnathan C. Peyton, said parcel containing four leagues of land, and situated on the left margin of the Brazos River, and below the falls thereof, I will permit the said James Marlin, in consideration of services rendered and to be rendered, to cultivate and enjoy one certain parcel of land of three hundred and twenty acres on which he now lives, free of rent or charge, until 1st day of June, A. D. 1860, and then at that time if the said Marlin is disposed to purchase the said parcel of land of three hundred and twenty acres he shall have the privilege of so doing at one dollar per acre, or for three hundred and twenty dollars, and that on such payment I
54 will make title to him of the same.

Given under my hand & seal by my attorney in fact this the 2nd day of April, 1858. Falls County, Texas.

[SEAL.] ANGELINA B. EBERLY,
Per JAMES HUCKINS,
Her Attorney in Fact.

THE STATE OF TEXAS,
County of Falls:

Before me, Sam'l D. Barclay, clerk of the county court of Falls County, personally appeared James Huckins, att'y in fact for Angelina B. Eberly, and who is to me personally known, and acknowledged that he, as attorney of the said A. B. Eberly, executed, sealed, signed, and delivered the foregoing and annexed instrument of writing for all the purposes therein contained.

To certify all of which I have hereto set my hand and affix the seal of my office at Marlin this day of April, 1858.

SAMUEL D. BARCLAY.

55 I, Samuel D. Barclay, clerk of the hon. co. court of Falls County, certify that the foregoing instrument of writing was filed in my office for record on the day of April, A. D. 1858, at o'clock m., and was correctly *rendered* by me on this 27 day of April, A. D. 1858.

Witness my hand.

Done at office in Marlin the day and date last written.

SAM. D. BARCLAY, *Clerk.*
Per SAM. BARNES, *Dep't.*

THE STATE OF TEXAS.
County of Falls:

I, J. M. Hart, clerk of the district court of Falls County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the above instrument of writing and its probate and record from the records of Falls County, Texas, as the same now appears of record in Book E, pages 282 & 283, of said record of deeds.

56 Witness my hand and official seal of said court at office in Marlin, M'ch 30, A. D. 1875.

[SEAL.] J. M. HART,
Clk D. C. F. C., Texas.
WM. O. CHRISTOPHER,
Deputy.

(Endorsed:) Angelena B. Eberly, by James Huckins, att'y in fact, to James Marlin. Copy.

57 AUSTIN, *Aug. 28th.*

Hon. M. HOPKINS:

DEAR SIR: Upon examination of the writ of certiorari in the Peyton vs. Hunnicut case, I see it calls for a lease made by Mrs. Eberly to James Marlin, referred to in the judge's charge as executed in 1857.

Attached to H. L. Bennett's deposition you will find, besides the paper you have copied (which is nothing but a power of attorney), marked Exhibit C, a lease made by Mrs. Eberly to James Marlin, marked Exhibit D.

You will observe that Exhibit C is endorsed on the back "Power of attorney," & I think upon reading it you will agree with me that by its terms it is not a lease, but is a power of attorney.

Exhibit D, the next paper, is by its terms a lease, and I think is the paper referred to in the judge's charge. I have no objection to have both papers inserted in response to the writ, but think Exhibit D should by all means be inserted.

Will you please write me your conclusion after examination?

Yours, truly,

L. W. GOODRICH.

NOTE BY THE CLERK.—Copied in explanation of the insertion of the lease executed in 1858, the certiorari calling for lease executed in 1857, there being no such paper lease executed in 1857.

(Here follows map marked page 57.)

58 I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing fifty-seven written pages and the two maps accompanying together make a full, true and complete transcript of the record whose diminution is suggested in the writ of certiorari accompanying in the case of Bailie Peyton et al. vs. W. S. Hunnicut et al.

In testimony whereof I hereunto set my hand and impress of the seal of said court at Austin, this Sept. 6th, 1878.

[SEAL.] M. HOPKINS,
Clerk.

(Indorsement on cover:) No. 227. W. S. Hunnicut, G. W. Barnes et al., pl'ffs in error, vs. Bailie Peyton, Sallie B. Parker & al. Certiorari & return. Filed 12th September, 1878.

OFFICE SUPREME COURT U. S.
FILED
MAR 22 1880
D. W. MIDDLETON, Clerk.

IN

Supreme Court of the United States

OCTOBER TERM, 1879.

No. 227.

W. S. HUNNICUTT et al., Plaintiffs in Error,

vs.

BAILIE PEYTON et al., Defendants in Error.

BRIEF OF S. R. FISHER,

Of Counsel for Defendants in Error.

MARCH 16, 1880.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 227.—OCTOBER TERM, 1879.

W. S. HUNNICUTT ET AL., PLAINTIFFS IN ERROR,

vs.

BAILIE PEYTON ET AL., DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Western District of Texas.

I.

Preliminary to the main discussion on the merits, defendants in error maintain:

That the bills of exception herein upon which errors are assigned cannot be considered by the court; that they constitute no part of the record. (For bills, see Record, pp. 31–89.)

First. Because they were presented for signature and signed beyond the time limited by rule 33, (Rules of Practice of the Circuit Court of the United States for the Western District of Texas,) no order of court or agreement of counsel extending the limitation of five days having been made prior to the expiration of the prescribed period; and because, after the rule had executed itself and become *functus officio* as to this case, it was not within the power of the district judge nor, indeed, of the Circuit Court, by the order of March 1, 1877, to reinstate the rule and except these bills out of its perfected operation. (Record, p. 88.)

Second. Because they were neither signed nor filed *nunc pro tunc;* but affirmatively show a signing and filing more than ten days after the close of the trial, and more than three days after the issuance, filing, and service of the writ of error, and the filing of the citation in error and the writ of error bonds. (Record, pp. 88–95.)

Third. Because the action of the circuit judge in signing, and that of the district judge in authorizing the filing of said bills, was *coram non judice*, the jurisdiction of the Circuit Court having been therefore suspended by the issuance and service of the writ of error. (Record, pp. 89, 94, 95.)

The judgment was rendered on the 17th day of February, 1877; on that day the trial closed. (Record, p. 18.)

February 24, 1877, the motion for a new trial having been overruled, the present writ of error was sued out, filed, and served. (Record, pp. 94, 95.)

On the same day the citation in error, reciting that the writ of error "had been filed in the clerk's office of the Circuit Court, &c.," was issued, (Record, p. 95,) and the bond of Watson and children, Z. Bartlette and wife, and William H. Jones, was approved and filed. (Record, pp. 89, 90.)

February 27, 1877, Hunnicutt, Barnes, and Kelly filed an approved bond. (Record, pp. 91, 92.)

March 1, 1877, Watson and children, Bartlette and wife, and William H. Jones, under an order of court of that date, filed an approved substituted bond. (Record, pp. 92, 93.)

February 28, 1877, the bills of exception were presented to the presiding judge and signed, over the objections of counsel for defendants in error. (Record, p. 88.)

March 1, 1877, the district judge made an order extending the time within which the bills might be signed and filed, in order to cover the previous signing, (Record, p. 89,) to which defendants in error excepted. (Record, p. 89.)

On the two first objections. Rule 33, above referred to, provides: "No bill of exceptions will be signed unless pre sented to the judge within five days after the close of the trial, unless further time be allowed by the court." * * * (Record, pp. 88, 89.)

In the absence of a rule fixing a period after the close of the trial within which bills of exception may be presented for signature, signed, and made a part of the record, it is conceded that the exceptions, if taken at the trial, may afterwards, during the term at which the trial is had, be drawn out, signed, and filed, and such bills, if signed *nunc pro tunc* as of the day of the trial, and disclosing affirmatively that the exceptions were taken at the trial, will constitute a part of the record; but when the practice in this respect is indicated by a positive rule of the court prescribing a period for the presentation of bills of exception for signature, and prohibiting signature by the judge unless the presentation be made within the prescribed time, it is believed that, after the expiration of such limitation, the judge's power to sign and authorize their filing is determined; that "*further time*" can only be allowed by an order of court or agreement of counsel made before the expiration of the time.

A general rule of practice with respect to matters sought to be regulated thereby, if not in conflict with some statutory regulation or rule of this court, is the law by which the court in which it is of force must be governed. The rule here, as well as in the lower court invoked, is the rule of that court with respect to the time within which bills of exception must be presented for signature; and its terms cannot, by retroaction, be extended to meet the hardships of any particular case, to the prejudice of the rights of the prevailing party, or to the abrogation of any advantage secured to him by the negligence or apathy of an opposing litigant.

It is admitted that some of the authorities seem to indi-

cate that a court has control over its rules during the term at which the cause is tried, and may suspend them when the purposes of justice seem to require. (United States *v.* Breitling, 20 Howard, 252.) But the power of suspension presupposes that, at the time the power is sought to be exercised, there is an operative rule upon which it may act; and where a rule is, in its nature, a statute of limitation, it is submitted that the power of suspension or extension must be exercised before the bar has completed itself, unless indeed the court have the power to revivify a rule which has expired by its own limitation.

Conceding, however, for argument's sake, that the court had the power to extend the time, *seven* days after the lapse of the time limited by the rule and *twelve* days after the trial had closed, still, under the authority of Walton *v.* United States, 9 Wheat., 657; Shepherd *v.* Wilson, 6 How., 265, and 16 How., 29, the bills cannot be considered, for they do not purport to have been signed on the 28th day of February, 1877, *nunc pro tunc*, as of the 17th of February, the day of the trial; but show positively and unequivocally a signing on the 28th of February. (Record, pp. 88, 89.) Such a showing, under the rule announced in Walton *v.* The United States, 9 Wheat., 224, and cited with approval by Waite, C. J., in ~~Stanton v. Embrey, 93 U. S., 586,~~ is fatal. The rule, as laid down in Walton *v.* United States, is, that though a bill of exceptions may be signed after the trial, yet "it is *signed nunc pro tunc*, and purports on its face to be the same as if signed pending the trial; and it would be fatal error if it were to appear otherwise."

On the third and last objection:

The bills of exception cannot be considered, because at the time of the signing and the filing thereof the *jurisdic-*

tion of the *Circuit Court* had been *suspended* and the *jurisdiction* of the *Supreme Court* had *attached*, by virtue of the issuance, filing, and service of the writ of error, the filing of the writ of error bonds, and the issuance and filing of the citation in error. (Record, pp. 89 to 95.)

The filing of the writ of error removes the record from the inferior to the appellate tribunal. (Brooks *v.* Norris, 11 How., 204; Muller *v.* Ehlers, 91 U. S., 250.)

The writ of error, the copy thereof lodged with the clerk for the defendants in error, the citation in error, and the bond of Watson and children, Bartlette and wife, and William H. Jones were filed February 24, 1877, and the citation recites that the writ of error had been filed. (Record, pp. 89, 94, and 95.)

"To permit a judge to make a statement of facts on which the case shall be heard here, after the case is removed to this court, by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy. The statement of facts filed without consent of the parties must be treated as an absolute nullity, and as there is nothing upon which error of the court below can be predicated, the judgment must be affirmed." (Generes *v.* Bonnemer, 7 Wallace, 565; see, also, Avendano *v.* Gay, 8 Id., 376; 21 Id., 551.)

The bills of exception in this case, upon which the case is to be heard here, having been signed, sealed, and filed after the cause was removed to this court by the issuance and service of the writ of error and the filing of the supersedeas bonds, can stand upon no higher ground, and must be treated as a nullity, having been signed and filed without consent of parties.

In Suydam *v.* Williamson, 20 How., 437, where, after the issuance of the writ of error, a paper was filed denominated the "case," which contained everything upon which error might be assigned and concluded, "a verdict was then, by the direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court upon questions of law, with liberty to either party to turn the case into a special verdict or bill of exceptions," this court *held* that, "even if an effect could be given to the paper which neither its contents nor terms warranted, yet this court could not do for plaintiff in error what it was his duty to have done at the trial and before the writ of error was sued out." In other words, that if the paper denominated "case" could be recognized either as a bill of exceptions or a special verdict, this court could not give it such character unless the plaintiff in error had taken proper steps in the court below to make it the one or the other form of procedure, *before the issuance of the writ of error.* See also the Slaughter-House Cases, 10 Wallace, 290, 291, as to the suspension of the jurisdiction of the court to which the writ is directed after the writ has been brought.

The conclusion from the foregoing authorities to be deduced is, that the bills of exception in the record cannot be considered, and that the judgment of the court below must be affirmed.

II.

In support of the first point made in their first bill of exceptions, (Record, pp. 31, 37,) to the effect that Peyton's title was an equitable and not a legal title, plaintiffs in error rely on the case of Hanrick *v.* Barton, 16 Wall., p. 166.

In that case there was no act of sale or deed from La Serda, the original grantee, and Justice Bradley, in delivering the opinion, (p. 171,) says:

"We do not mean to say that the original grantee, if not prohibited by law, might not have assigned his inchoate title to a third person, nor that the title might not, by a grant in proper form, have been perfected in such assignee; but we think that the legal effect of the extension of title *in this case*, by the document offered in evidence, was to perfect La Serda's title, and not to vest title in Williams.

"This conclusion renders it necessary that Williams should have had a power of attorney from La Serda, in order that a deed executed by him should have any efficacy in transferring the title to another. But no such power was among the papers previously offered in evidence, at least so far as appears by the bill of exceptions now under consideration."

In the case at bar we have (Record, p. 33) an act of sale or deed from Basquez, the original grantee, to Hartz, reciting that Basquez "has sold really and publicly in *fee and forever*," &c., the grant in question, with all the privileges, &c., and (Record, p. 34) "for the security and surety of this sale he pledges the personal property that he now has or may have, and with it he submits himself to the law."

Also, an act of sale or deed (Record, p. 35) from said Hartz to Jonathan C. Peyton, the ancestor of the plaintiffs in the court below, by which Hartz "sells, really, publicly, and in fee and forever" the grant in question, and "for the sanctity and security of this sale he binds his personal property, that he has or may have," &c.

In both these deeds or acts of sale, the consideration therein mentioned is acknowledged to have been paid. In connection with these deeds is the power of attorney from Basquez to Hartz, (Record, p. 31,) with power of substitution, and the substitution of Peyton by Hartz, (Record, p. 34,) so that Peyton, when the land was surveyed had, not only the title to the grant, but the full power to do and perform all acts necessary or incident thereto. The power from Basquez to Hartz, and the substitution of Peyton by Hartz, are both referred to in the deeds or acts of sale above mentioned.

Basquez had the right to sell the grant. (Clay *v.* Holbert, 14 Tex., 204; Ryan *v.* Jackson, 11 Tex., 391; Fulton *v.* Duncan, 18 Tex., 34; Martin *v.* Parker, 26 Tex., 253.)

In the last case cited, (Martin *v.* Parker,) it was objected: "that the deed from Manchaca to Reynolds, of the 2d of September, 1830, having been executed before the title of possession was issued, did not pass the legal title, but a mere equity which, not having been perfected into a legal title by suit for specific performance, has become inoperative and worthless by the lapse of time."

The court, after stating that the application of such a doctrine to a title which invests the holder with the legal ownership and absolute power of disposition of lands, was inadmissible, proceed to say:

"But at the time of acquisition of the title by Reynolds, the common-law distinction between legal and equitable titles did not obtain. Before the deed in question was executed, Reynolds had received a power of attorney from Manchaca to apply for and obtain the title of possession. Repeated decisions of this court have settled, that those who acquire land by purchase under the 24th article of the colonization law of the 24th March, 1825, could sell as soon as the grant was obtained and before the title of possession was issued. (Ryan *v.* Jackson, 11 Tex. R., 391; 14 Id., 191; Fulton *v.* Duncan, 18 Tex. R., 34.) A power to apply for and obtain the title and sell, the attorney being required therein to take upon himself the fulfillment of the obligations and requirements of the law, has been considered as evidencing a sale valid under the colonization law. (11 Tex. R., 391.) Here there was a formal act of sale, with a power to obtain the title of possession. This, we think, must be held to constitute the purchaser the absolute owner of the property, when under the power conferred he came into the possession of land.

"The vendor having authority to sell expressly conferred by law, it must, we think, be held that the act of sale operated to pass the title in full and absolute property *to his vendee*, when the latter was put in possession of the land and the evidences of title by the proper officer of the government.

"Whether strictly and technically a legal, as distin-

guished from an equitable, title or not, we think it was such a title as constituted ownership, with the consequent right and power to alienate and dispose of the property absolutely. We, therefore, do not think the objection tenable."

In the case of Hanrick *v.* Barton, 16 Wallace, 170, the court sanctions this view in the quotation there made from Clay *v.* Holbert, 14 Tex., 202: "As in the latter case (page 204) the Supreme Court of Texas say 'the primitive title is the concession from the executive of the State, and it was competent for the purchaser to alienate at any time after his primitive title.'"

If, as held in Hanrick *v.* Barton, a power of attorney from La Serda to Roberts authorizing him to sell, and a substitution by Roberts of Williams, and a sale by Williams passed a legal title, surely a sale (not a mere power to sell) from Basquez to Hartz, and from Hartz to Peyton, passed a legal title to Peyton.

But by what law, by what test, is the title of Peyton to be adjudged an equitable title? Equitable and legal titles are founded upon the distinction between equitable and legal estates.

Mr. Washburn, in speaking of the classification of estates into the legal and equitable, says: "It is intended to describe such as derive their origin from and are governed by the rules of the common law, and those created and preserved by a system of rules devised and adopted by courts of chancery." (1 Wash., 4th ed., p. 34.)

Mr. Williams says: "The estate in fee-simple which is vested in the trustee is called the legal estate, being an estate to which the trustee is entitled only in the contemplation of a court of law as distinguished from equity. The interest of the *cestui que trust* is called the *equitable estate*, being an estate to which he is entitled only in contemplation of the court of chancery which administers equity." (Williams on Real Property, ed. 1857, p. 153.)

Mr. Crabb says: "A legal estate is that which is created by some common-law conveyance, or some assurance under the statute of uses; and an equitable estate is that which is created through the medium of a trust of which a court of equity takes account." (Crabb on Real Property, vol. 2, sec. 947.)

From these definitions, it follows that there cannot be an equitable estate or title in one, without a corresponding legal estate or title in another. In other words, there must be a trustee in whom the fee is vested, and a beneficiary or *cestui que trust.*

In the case at bar, where and in whom is the fee, or legal estate? Where and in whom is the equitable estate? And how was the trust created?

The fee and absolute title was vested in Basquez, when the concession was made with the power of disposing of it. All the estate and interest which the government had to convey was conveyed. (Hancock *v.* McKinney, 7 Tex., 451, 452.)

In the case of Martin *v.* Parker, 26 Tex., 260, a case similar to the one at bar, the court, as we have seen, say: "The vendor having authority to sell expressly conferred by law, it must, we think, be held that the act of sale operated to pass the title in full and absolute property *to his vendee*, when the latter was put in possession of the land, and the evidences of title issued by the proper officer of the government."

The fee, then, is not in the government, nor can it be in Basquez; for if it passed to him, and he had the power to dispose of it, and has disposed of it, as he did do in express terms by his act of sale, it can only be in the vendee. There is no room for a trust. The estate, expressly limited in terms by the act of sale or deed from Basquez, is an estate in fee; for he there declares "that he has sold, really, publicly, and in fee and forever," &c.

If Basquez had the fee and passed the fee, it is an ab-

surdity to say that there is an express trust; and no estate can arise by implication to defeat an estate which is expressly limited. (2 Washburn on Real Property, p. 471.)

But, at the time of the acquisition of Peyton's title, as noted by the Supreme Court of Texas in the similar case of Martin *v.* Parker, 26 Tex., 259, the common-law distinction between legal and equitable titles did not obtain.

The case at bar does not, as the plaintiffs in error would have it, involve the question of *remedy*. The question is one of *estate*, and must be determined by the law in force when the title was acquired. In Steinbach *v.* Stewart, 11 Wall., 576, a case where, according to the common law, the fee would not have passed, this court say: "It is to be noted, however, that its character and effect were to be determined by the Mexican law. It was made before California had been added to the United States. In inquiring what was the intention and effect of the instrument, we are not then to be guided by the rules of the common law, or by the *British statute of uses*."

And in the case of Hanrick *v.* Barton, so frequently referred to, the court say: "This being the law in Texas, where the deed was executed, it was sufficient in form and mode of execution to pass a perfect title at that time from La Serda to the grantees; for it is well settled that, if a title once become vested, no subsequent change of the law as to forms or solemnities of conveyance will divest it." (p. 174.) When, by the statute of a State, a title which would otherwise be deemed merely equitable, is recognized as a legal title, it will be held by the Federal courts a legal title. (Robinson *v.* Campbell, 3 Wheat., 212.)

If, by the grant, all the estate and title, legal, equitable, or otherwise, of the government, with the right of sale, passed to Basquez, and all his estate and title, legal, equitable, or otherwise, passed by his act of sale to his vendee, upon what principle will the court now undertake to apply the statute of uses, or any other law or technical rule not

then in force or applicable thereto, to defeat the estate and right which was perfect and absolute when issued?

The difference between a Mexican concession or grant by sale, where the State never had any title to the land, as in the case at bar, and a patent from the United States or a State, as noted in Hanrick *v.* Barton, 16 Wall., 170, is too obvious for comment.

The grant to Basquez being the *primary* title, and the extension to the land but the incident, the extension when made related to the grant, and inured to the benefit of and vested in Peyton, the purchaser and successor, the absolute title in fee, even if it did not (as we contend) pass when the grant was made.

Peyton, through power of attorney and act of sale, stands in privity to Basquez, who initiated the proceedings, and though the extension of title is not to be analogized to a patent, still, if necessary, we may, without fear of the result, invoke the doctrine of estoppel and relation.

If applied for the purpose of justice in the case of a patent, where the fee resides in the government until the patent issues, it certainly should apply to a case where the government parts with all its title when a grant is made.

See Barr *v.* Gratz, 4 Wheaton, 213.
Stoddard *v.* Chambers, 2 Howard, 284.
Landers *v.* Brant, 10 Howard, 348.
Bean *v.* Welsch, 17 Ala., 770.
Dickerson *v.* Talbot, 14 B. Monroe, 60.
Coranda *v.* Smith, 5 Iowa, 157; 9 R. I., 528.
Irvine *v.* Irvine, 9 Wall., 617.
Langdean *v.* Hanes, 21 Wall., 521; 9 Wall., 315; 13 Wall., 92.
McCarty *v.* Mann, 19 Wall., 32.

2. The second point under this bill of exceptions is, that the grant is void for insufficient description of the land therein, &c.

Neither the grant nor any description of the land, by which this court can review the rulings of the court below, is set out in the bill. In the extension of title, the alcalde refers to the eleven leagues as upon the Brazos River; "the situation, lines, limits, and corners of the same are delineated in the notes of survey made by the principal scientific surveyor, Francis W. Johnson, on pages 2 and following of this proceeding, with the figures thereof shown in the map hereunto annexed." (Record, pp. 36 and 37.)

The notes of survey and map to which he refers are not in the bill.

The bill states that, in connection with the papers therein set out, the plaintiffs in the court below also offered in evidence the original testimonio of their title and evidence tending to show that this testimonio was, in April, 1841, spread upon the records of the proper office in the county where the lands lay, and evidence tending to show a possession by them under said title commencing in 1857, and of the payment of taxes. (Record, p. 37.)

Neither the original testimonio, nor anything purporting to be a copy of it, appears in the bill or anywhere in the record. The presumption is that, with these papers and facts before the court below, its ruling was right. This court will not look beyond the bill itself. (Reed *v.* Gardner, 17 Wall., 409.) Error will not be presumed. It must be affirmatively shown, and the evidence showing it must appear in the bill. (Wiggins *v.* Burkharn, 10 Wall., 129; Generes *v.* Campbell, 11 Wall., 193; Ely *v.* Russell, 2 Black, 575; 3 How., 553.)

If the court looks beyond the bill to the pleadings and judgment, the land is described in the amended petition, to which no objection was raised, and upon which the case was tried, (Record, p. 16,) and in the judgment which substantially conforms thereto, (Record, p. 19,) as "four leagues on the left bank of the Brazos River, in the county of Falls, State of Texas, known as the Gregorio Basquez

four-league grant, beginning at a stake marked 'P' on the east bank of said river of Brazos, in said county of Falls, at the point where the upper line of the Austin and Williams reserve on the east side of said river intersects said river; running thence on said upper line of said reserve north 71° east 20,220 varas to a stake, crossing Isaacs Creek; thence south 19° east 5,000 varas to another stake for the third corner; thence south 71° west, crossing again the aforesaid creek to a stake on said river for the fourth corner; thence up said river to the place of beginning, covering an area of four leagues, fronting on said river and lying within said Austin and Williams' reserve, immediately below and adjoining said upper line of said reserve."

In the absence of anything in the bill itself, the pleadings, or the judgment, to show the contrary, the presumption is that the plaintiffs' *probata* conformed to their *allegata*, especially as no objection was at any time made on the ground of variance. If, however, the court, still not satisfied, should go outside of the bill itself, the pleadings, and judgment, and should look to the charge of the court and to the fifth bill of exceptions, (Record, p. 46,) it will find a description of the land, taken from what purports to be a land-office copy of the title, which was not offered in evidence when the objection was made, but at a later stage of the case and for a different purpose. The description there found is as follows: "The second survey of four leagues has the situation, limits, lines, and corners as follows, to wit: Situated on the left margin of the Brazos River, and beginning at a stake upon said margin marked 'P;' from thence north 71° east, and at 10,200 varas crossing what is called Isaacs Creek, and at 20,220 varas set a stake for the second corner; from thence south 19° east 5,000 varas, set another stake for the third corner; from thence south 71° west 18,320 varas, again crossing the aforesaid creek to the River Brazos, where set another stake for the fourth corner; from this point up the river,

with the meanders of the same to the place of beginning, and contains an area of four leagues of land, or, which is the same, 100,000,000 square varas, bounded by the river, and on its other sides by vacant lands; and, to the best of my knowledge, is composed of 18,750,000 square varas, or, which is the same, three-quarters of a league of arable, and 81,250,000 of square varas, or, which is the same, three and a quarter leagues of pasture land, and its figure that is shown in accompanying map."

If this be assumed to be the description referred to in the bill, it was, by itself, and certainly in connection with the other evidence, sufficient.

The genuineness of the title was admitted; possession had been held under it for nearly twenty years, with payment of taxes. Plaintiffs stood ready to prove, and did afterwards prove to the satisfaction of the jury, its actual survey and identity on the ground. The presumption was that the survey had been made, and it was incumbent on the defendants to repel this presumption by proof. (Phillips *v.* Ayers, 45 Tex., 601; Jenkins *v.* Chambers, 9 Tex., 167; Booth *v.* Strippleman, 26 Tex., 436.) The action of the alcalde in extending title on the survey is not to be examined with hypercritical spirit. (Hancock *v.* McKinney, 7 Tex., 384; Hancock *v.* Horton, 11 Tex., 220.)

There is no patent ambiguity in the grant, but the court held that an actual survey was necessary to its validity. The court charged, as we contend, against the law and in favor of the defendants, when it said: "We instruct you, then, that the paper title introduced by the plaintiffs vested in Jonathan C. Peyton the title to the Basquez four-league tract, where the plaintiffs claim it to be; provided the surveyor actually surveyed and set apart to him substantially that identical land. You will, therefore, proceed to inquire whether the Basquez four-league tract was actually surveyed upon the ground. The plaintifis claim that it was; the defendants say it was not; and this issue you must de-

cide." (Stafford *v.* King, 30 Tex., 537; Newsom *v.* Pryor, 7 Wheat., 7; Jones *v.* Burgett, 46 Tex., 284.)

Upon the issue thus presented the jury, upon abundant evidence, found for the plaintiffs, and their finding is not revisable in this court. (Fowler *v.* Rathbone, 12 Wall., 102; Express Co. *v.* Ware, 20 Wall., 543.) Even though the court be of opinion that it is against the weight of evidence. (Stroud *v.* Springfield, 28 Tex., 649.)

We challenge the production of a single case in Texas, or elsewhere, where a grant of this character, containing as specific description of the granted premises, has been held absolutely void upon an objection *in limini*.

To have so held in this case would have been confiscation under the guise of construction. It is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. However great the difficulty of locating it, if testimony can be offered which will lead to this result, it should not be held absolutely void for uncertainty. (Blacke *v.* Doherty, 5 Wheat., 359; Ragsdale *v.* Robinson, 48 Tex.; Williamson *v.* Simpson, 16 Tex., 433; Phillips *v.* Ayers, 45 Tex., 601; Johns *v.* Shutz, 47 Tex., 578; Booth *v.* Strippleman, 26 Tex., 436; Kingston *v.* Pickers, 46 Tex., 99; Jones *v.* Burgett, *Id.*, 284; Lohff *v.* Germer, 37 Tex., 578; Browning *v.* Atkinson, *Id.*, 633; Cavazos *v.* Trevino, 6 Wall., 773; Stafford *v.* King, 30 Tex., 257; Bass *v.* Mitchell, 22 Tex., 285; Mitchell *v.* Burdett, *Id.*, 633; Bolton *v.* Lann, 16 Tex., 96; Urquhart *v.* Burleson, 6 Tex., 502.)

III.

Defendant's second bill of exceptions raises the question of the admissibility of the depositions of Horatio Chriesman, in particular the 4th, 9th, and 19th answers, objected to by the defendants on the ground "that it is hearsay testimony and cannot be received to prove the specific fact

sought to be established, viz., that said Basquez was in fact surveyed by Moore on the reserve line, or at any other particular place." (Record, pp. 38 to 41.)

The testimony contained in the 4th, 9th, and 19th answers was, substantially, that William Moore, a deputy surveyor of Colonel F. W. Johnson, informed witness that he (Moore) had run the upper line of the reserve on the east side of the Brazos River, and that said line began on the east bank of the river, a short distance below the falls, running N. 71° E. "He (Moore) informed me that he had made the survey of the said four-league Basquez grant; that the upper line of the said grant began on the east bank of the Brazos River, at the point where the upper line of the reserve began, and that the upper line of the Basquez ran N. 71° E. with the reserve line, the full distance of the Basquez line, and that the upper line of the Basquez and the upper line of the 'reserve' were the same to the extent of the Basquez line. I have heard Moore speak of the Basquez four-league survey and its location with reference to the upper line of said reserve. I do not recollect the words of Mr. Moore, but he said to me in substance that he had run the lower line of said grant, its course being the same as the course of the upper line. The width of the survey is 5,000 varas, as shown by the map." (Record, pp. 40, 41.)

The witness Horatio Chriesman was by profession a surveyor, who commenced surveying in Texas, in 1823, as principal surveyor of Stephen F. Austin, one of the colony contractors of the colony of Austin and Williams. He continued to survey in the different colonies of Austin and Austin and Williams until the annexation of Texas to the Federal Union.

In the fall of 1833 he and Wm. Moore were engaged together in making surveys on the east side of the Brazos River, in what was known as Austin and Williams' reserve, in the colony enterprise of Austin and Williams. The

surveys being then made by them, were small surveys of four labors each. Those on the Brazos, fronting on the river 1,000 varas and running back for quantity, were made by Chriesman; those back were made by Moore, one of his surveys covering the width of two of Chriesman's. These surveys were to include all the lands on the east of the Brazos lying between the Ruez grant, which lay within the reserve on its lower or south boundary, and had a width on the Brazos River of 5,000 varas, and the lower line of the Basquez grant of four leagues, which also lay within the reserve immediately below and adjoining its north or upper boundary, and had also a width of 5,000 varas on the river. The distance along the river front, between the upper line of the Ruez and the lower line of the Basquez, was 50,000 varas, making, with the width of said grants, a total distance of 60,000 varas inside of the reserve. These small surveys so being made by Chrissman and Moore, were made under the instructions of F. W. Johnson, the principal surveyor of Austin and Williams' colony. All the surveyors and chain-carriers who acted for Johnson, and also for his deputies, were dead when the testimony of Chriesman was taken. (Record, p. 41.)

It was shown in the sixth answer of Chriesman that Moore was dead when these depositions were taken, and had been for many years prior thereto. (Record, pp. 38 to 41.)

The boundaries of Austin and Williams' colony, defined in article 245, page 154 of Paschal's Digest of the Laws of Texas, vol. 1, comprehended about 200 miles in breadth and 300 to 350 miles in length, embracing within its entire length both sides of the Brazos River from the line of the ten border leagues on the coast of the Gulf of Mexico, to a line extending northwest from the Red fork (or Salt fork) of the Colorado River to the dividing ridge between the waters of the Brazos and Trinity rivers.

The reserve mentioned by the witness, and referred to

in the pleadings and charge of the court, was 27 miles in width and about 60,000 varas, or 31 miles in length. It embraced both sides of the Brazos River, and was in size equal to a large county of the present day.

The lines of this reserve were in 1833 and 1834 generally known and of common notoriety in the section in which they were made. (4th answer, Record, p. 38.)

The Basquez four-league survey in controversy contains 17,712 acres of land. It belongs to a class of surveys of general interest, and its lines, corners, and boundaries being of a class in which many persons are interested, its boundaries, even under the strict rule of the common law, could be proven by reputation or hearsay, and much more so could those of the reserve.

The declarations made by Moore to Chriesman were made within said reserve in the immediate vicinity of the lower line of the Basquez, and while both he and Moore were surveying therein. All of these facts are shown by Chriesman's testimony, copied in the record.

The plaintiffs also offered evidence tending to show that the lines of the four-league Basquez grant were actually found upon the ground, the upper one being identical with the upper line of the reserve, and the lower one 5,000 varas below and parallel therewith; (see charge of court, Record, p. 27;) and the jury, upon the distinct issue of actual survey or not, found that such survey had been made at the place claimed by defendants in error.

We believe the testimony was clearly admissible under the decisions of our Texas Supreme Court, beginning with the case of George *v.* Thomas, 16 Tex., p. 92, decided in 1856, and continuing down to the present day, wherein it is decided that reputation is admissible as evidence in questions of private boundary; and that court has in numerous decisions given to the unsupported declarations of a deceased person, as to where a line or corner is, the weight of common reputation, and have permitted such declara-

tions to be proved under the rule that in questions of boundary hearsay is evidence. See

Stroud *v.* Springfield, 28 Tex. R., 649.
Welder *v.* Carroll, 27 Tex. R., 332.
Smith *v.* Russell, 37 Tex. R., 255.
Evans *v.* Hurt, 34 Tex. R., 111.
George *v.* Thomas, 16 Tex. R., 92.

See also the following cases, decided by other Supreme Courts, which are cited and approved by our Supreme Court in Stroud *v.* Springfield:

Speer *v.* Cook, 3 McCord, (S. C.,) 227.
Blythe *v.* Sutherland, Id., 258.
Boardman *v.* Reed, 6 Peter, 341.
Shutte v. Thompson, 15 Wall. 162, 163

The rule established by these decisions has become so firmly engrafted upon the laws of Texas as to become a rule of property. It was adopted from the absolute necessity of the case. At least one-half of the State is prairie, entirely destitute of timber. The beds of rivers and of streams make frequent and marked changes, and even where marked trees are made the witnesses of a corner or a line, they are swept away by a sudden rise, or cut down and destroyed as the country is settled and improved.

The rule has also been adopted by many of the courts of the other States.

See cases from N. and S. Carolina above cited.
Tate *v.* Southered, 1 Hawkins, (N. C.,) 45.
Shepherd *v.* Thompson, 4 N. H., 213; 49 N. H., 230.
Powers *v.* Selsby, 41 Vt., 289.
Higby *v.* Bidwell, 9 Conn., 447.

Where the rules of evidence of the State, those established by statute as well as those established by the decisions of the highest tribunal of the State, become a rule of property, more especially in matters of real estate, we believe they are binding upon the judges of the United States in

the trial of such suits in the United States courts. (2 Black, 599.) 4 Pet. Rep. (Mason Ed.) 256, 257.

The law presumes that the surveyor made the survey and marked, when practicable, the lines and corners on the ground.

There was abundant evidence, adduced upon the trial, showing marked lines, corresponding with the field-notes, as will be perceived by the charge of the court. (Record, p. 27.) It was even shown that the peculiar marks known to be William Moore's were found upon three lines, and established beyond a doubt that this was the identical land surveyed by Moore for the Basquez four-league grant. (Id.)

The testimony of Chriesman, objected to as the declarations of the deceased surveyor Moore, was the reputation as it existed in 1833, in the neighborhood in which the lands were situated, and the facts detailed by him were gathered from the settlers in the immediate vicinity of the lines and from William Moore, the surveyor who made the survey. These persons had peculiar means of knowing where the lines of the reserve and of the four-league Basquez survey were.

IV.

The third bill of exception is to the same testimony of Horatio Chriesman. Whether the court will consider two separate bills of exception to the same testimony or not, we are not advised, but believe that they will not. If, however, it be proper to entertain the second bill to the same testimony, we will consider it in the order in which the causes are assigned.

The first is: There is no record proof that the upper line of Austin and Williams' reserve was ever in fact run, or ever required, by law, order, or decree, to be run.

The reserve of Austin and Williams mentioned by the witness was about 60,000 varas (or 31 miles) in length, and

about 50,000 varas in width. The lines of the reserve were actually run and marked upon the ground, and were of common notoriety in the neighborhood. As shown by witness Chriesman, and others, the reserve contained within it the Ruez grant, lying on the south line, and the Basquez grant of four leagues on the north line, each on the east side of the river, and having each a front of 5,000 varas; the country lying between these two surveys, except about 2,000 varas, being cut up or subdivided into small surveys of four labors each, fronting 1,000 varas on the river. It was doubtless the intention of the proprietors, Austin and Williams, to segregate and set apart this reserve for the formation of a dense and compact settlement, the better to guard against the approach of hostile Indians; and within it the general and indiscriminate location of lands by colonists and others was by them prohibited. (See testimony of Chriesman, answer 11.) The maps from the General Land Office of Texas, offered in evidence, showed the lines of this reserve, *particularly the upper line, east of the Brazos River.* (See maps attached to Record, p. 143.)

Also charge of the court, (Record, p. 27,) in which it is stated what plaintiffs in the court below claimed to have proved. It was, therefore, a known and fixed line, and it mattered not whether it was required by law, or order, or decree to be run.

The second ground of objection is: "Because there is no call made for the Austin and Williams reserve line in the grant of four leagues to Basquez.

It was the duty of the surveyor who made the survey to run out and mark the lines and boundaries of it upon the ground, and in his field-notes to designate, by apt calls, the lines and corners so run and marked; but his failure to do so cannot possibly affect the rights of the interested party. It has, at all times, been held that parol testimony

was admissible to show where the lines and courses were actually made upon the ground, even though there may be a discrepancy betwen its position thus ascertained and that given it by the calls or plat on the grant.

See Wilder *v.* Carroll, 29 Tex., 332, 333, 335.
Williamson *v.* Sampson, 16 Tex., 442.
De Leon *v.* White, 9 Tex., 607.
Bolton *v.* Lann, 16 Tex., 112.
Dally *v.* Booth, 16 Tex., 565.
Urquhart *v.* Burleson, 6 Tex., 511–513; which case cites and approves the case of
Parsons *v.* Roundtree, 1 Hay R., (Tenn.,) 378.
Hughes *v.* Sandal, 25 Tex., 162.
Smith *v.* Russell, 37 Tex., 255.
v. Moon, 34 Tex., 45.
Blake *v.* Doherty, 5 Wheat., 359.

The third ground, although not so divided, is because Chriesman, the witness, does not say that said Moore ever pointed out to him the place on the ground that he had run, either the reserve or the Basquez line.

The reserve line, as before shown, was a noted line, actually traced and marked upon the ground on the east side of the Brazos River, leaving the Brazos a short distance below the falls of the Brazos, a well-known point, running north 71° east about 15 miles—the surveyor who made the survey saying he had run and marked this line of the reserve, and also made the survey of the Basquez four-league grant; that he had surveyed the upper line of the grant on the upper reserve line, and that the two lines were identical the full length of the upper line of the Basquez grant. These declarations of Moore were made to Chriesman while surveying in the reserve and, as stated by the witness, in the vicinity of the Basquez grant. This was the same as pointing out on the ground the identical line

or place where he had made the lines, but it was not necessary that he should actually point out the place.

See 49 N. H., 230.

Powers *v.* Selsby, 41 Vt., 289.

Wood *v.* Willard, 37 Vt., 377.

Higby *v.* Bidwell, 9 Conn., 447.

V.

The defendants' fourth bill of exceptions calls in question the admissibility of the two reports of surveys made in the cases of Rhoda B. Huckins *v.* J. C. Pool and J. C. Pool *v.* C. Jones, in District Court of Falls county, made November 16, 1869, and the case of Angelina B. Eberly *et als.* *v.* James Marlin, (erroneously printed Martin in printed record,) made 29th of December, 1857. The first was signed by S. W. Bingham, R. F. Alexander, W. S. Hunnicutt, (one of the defendants in this suit,) and J. H. Collard. The second was signed by the said W. S. Hunnicutt alone. The objection made thereto was, as stated in bill, (page 44 Record,) that defendants were not parties or privies to said cause. In the bill it is not stated to which report the parties defendant were not parties or privies, but the words "said cause" refer to the last, and not to the first report. C. Jones was Churchill Jones, under whom the defendants, Watson, Bartlette, and Jones, claimed as heirs at law. W. S. Hunnicutt was the chief defendant in this suit, and his sworn report was certainly admissible as evidence against him; and if the other defendants wished it restricted alone to him, they should have asked an instruction to that effect, or they might have obviated the force of the testimony objected to by a severance on the trial, which was clearly authorized by the Circuit Court practice. Failing to do so, they are bound by the testimony as far as it affected them.

It was not objected that the parties who made the report

were still living and that they were accessible to the court, nor was it objected that the testimony was hearsay and inadmissible upon any of those grounds.

See Burton *v.* Diggs, 20 Wall., 133.
11 Wheat., 210.

It was not objected that the testimony was not material; if it was not, it did not affect the rights of the defendants. The gist of the report, in the first case is, that all the land claimed by the said J. C. Poole is included within the boundaries of the Basquez and Sanchez surveys, as set forth in the accompanying plat of said survey. It is not shown by the report what lands Poole claimed, nor is the plat referred to made a part of the bill of exceptions, nor is it contained in it.

In the second report, signed by defendant in this suit, (W. S. Hunnicutt,) it is said: "I find the league and labor of land surveyed and located for and in the name of James Marlin to be entirely in conflict with the before-named survey" (the Basquez four-league survey). It is not shown by the report what connection the James Marlin survey had with the lands claimed by the defendants in the court below.

VI.

There was no error in the refusal of the court to charge the jury, as requested by plaintiffs in error in their fifth and sixth bills of exception, which will be considered together. (For bills, see Record, pp. 45 to 62.)

(1) That the Basquez is the elder and better title can, we think, admit of no question; but plaintiffs in error having shown, in connection with their Sanchez grant, a survey made by Wm. Moore, antedating the survey upon which the Basquez title is based, as well as the one upon which the Sanchez title was extended, insist that the Sanchez final title of possession, when issued, though junior to

the Basquez final title, related back to the making of the survey by Moore, and is, therefore, the elder and better title. (Record, pp. 45 to 61.)

Until the extension of the final title, or at least until the order of survey and survey thereon, the concession to Sanchez did not attach to any particular land. It simply authorized him to denounce the quantity of land called for in the concession, and to apply to the alcalde, or commissioner, charged with that duty, to extend to him the final title of possession. It is immaterial, therefore, which concession—the Basquez or the Sanchez—was first in point of time, as the right to specific lands, to be selected and located by virtue of the concessions, respectively, did not and could not arise until a survey had been made in obedience to an order proceeding from the proper authority.

Linn *v.* Scott, 3 Tex., pp. 67, 78.

That the survey upon which the Sanchez title was finally extended, had been previously made without authority, could constitute no valid objection to its subsequent adoption by the legally authorized surveyor; but such adoption could only make it a valid survey *as the foundation of a right* from and after the time when the survey was legally ordered.

Jenkins *v.* Chambers, 9 Tex.
Howard *v.* Perry, 7 Tex., 266.

Such a survey, without the authority of an order, was an absolute nullity, and could not raise an equity to which a subsequent perfect title could relate so as to cut off intervening rights regularly acquired.

The case here is not that of an elder *valid* entry or survey to which a junior patent might attach, to the destruction of a senior patent based upon a junior entry or survey.

Warren *v.* Shuman, 5 Tex., 455;
Le Bois *v.* Brammell, 4 How., 462;
Tabor *v.* Commissioner, 29 Tex., 519.

A further inspection of the two titles, as exhibited in the bill, (Record, pp. 45–60,) discloses that the application by Sanchez, for his final title of possession, was made on the 7th day of October, 1833, the very day on which the final title was extended to Basquez; also, that therein he describes the lands selected by him as one league and a quarter, on the left bank of the river Brazos, between *the lands surveyed for Gregorio Basquez* and Antonacio de la Serda, (Record, p. 54,) and that the survey reported upon the order issued on this application, and upon which the final title was extended *October* 19, 1833, describes the land as lying between the lands surveyed for *Gregorio Basquez* and Antonacio de la Serda. (Record, p. 55.)

On the other hand, the application made by Peyton for a survey of the Basquez, upon which title was extended, bears date September 21, 1833, and describes the land as "seven leagues on the left margin of the Brazos, * * * and the four leagues to complete the number of the concession, I wish to take upon the same margin about four leagues below that of the first survey," (Record, p. 45,) and the survey, ordered upon the application, describes the lands surveyed as seven leagues upon the left margin of the river, &c., * * * and four leagues upon the same margin, about four leagues below the first survey, * * * bounded by the river, and on its other sides by *vacant lands*, &c. (Record, pp. 46, 47.)

Thus it will be seen, that the Basquez title was extended upon lands which do not seem to have been previously appropriated, and that the attorney of Sanchez, in his application, the surveyor in making the survey, and the alcalde in extending the title, recognized and conceded the priority of the Basquez survey.

Besides, there is nothing in the survey, as made by Moore, to show for whom or upon what authority it was made, and no allusion to the Moore survey is found any-

where in the dispatch of the title extended to Sanchez. (Record, pp. 52 to 60.)

That Moore made the survey relied upon, and that his work was adopted by the surveyor authorized by the order of October 7, 1833, (Record, p. 54,) to survey the lands for Sanchez, might be safely conceded; but there is nothing to show that the survey, at the time it was made by Moore, was authentic; and, assuredly, it could have no standing as a valid act until authorized. The survey was not authorized until after the lands covered by it had been appropriated by the Basquez extension of title.

(2) *On the statute of limitations.* The court correctly charged the jury that the possession held by the defendants of lands covered by their junior title could not avail them as a bar to a recovery of the land sued for, unless that possession had been an actual, adverse, exclusive, continuous, and uninterrupted possession for three years of the lands in controversy, embraced within the conflict with plaintiffs' title. (Record, p. 30.)

White *et al. v.* Burnley, 20 How., 251.
Gillespie *v.* Jones, 26 Tex., 346.
Horton *v.* Crawford, 10 Tex., 386.
Wheeler *v.* Moody, 9 Tex., 377; (citing with approval, 1 Mar., 106; Smith *v.* Mitchell, Id., 208, and Trotter *v.* Cassidy, 3 Mar., 366.)
Portis *v.* Hill, 30 Tex., 530.
Trimble *v.* Smith, 4 Bibb, 257.
Fox *v.* Hinton, 4 Bibb, 559.

To this charge as given, defendants took no exception, and will be held to have acquiesced in its correctness; but they contend, in their sixth bill of exceptions, (Record, p. 61,) that there was error in the refusal of the court to charge the jury, in effect: That their constructive possession, growing out of actual occupancy of the conflict between the two

opposing titles, could only be destroyed and restricted to their actual possession by an adverse entry and occupancy of the plaintiffs within the conflict, taken before the completion of the bar. And also error in the charge of the court given on this point, to the effect: That, where both the junior and senior grantee are in possession of lands embraced within the boundaries of the elder grant, possession being taken under the elder grant, before the completion of the bar, constructive possession follows the elder title and limits the possession of the junior grantee to his actual possession. (Record, pp. 6 and 30.)

Ballard *v* Perry, 28 Tex., 367;
Sutton *v.* Carabajal, 26 Tex., 500;
Hays *v.* Barrera, 26 Tex., 81;
Ledyard *v.* Brown, 27 Tex., 405;
Green *v.* Liter, 8 Cranch, 229;
Clark *v.* Courtney, 5 Peters, 354;
Barr *v.* Gratz, 4 Wheat., 213;
Hunt *v.* Wickliff, 2 Peters, 213.

Bradley v. Layson, 2 J. J. Marsh. 258; Layson v. Galloway, 4 Bibb, 100

Further, it does not appear from the charge given, nor elsewhere in the record, than in the bill, that plaintiffs' entry was not within the interference, and the bill does not purport to give all the evidence on the point.

VII.

Innocent Purchaser. Plaintiffs in error insist in their seventh and last bill of exception that, having offered evidence tending to show that at the date of the purchase by their ancestor, Churchill Jones, the said Jones had no notice by map, record, or otherwise, of any conflict of the John Marlin league with the Basquez grant, the court should have charged the jury to find for the defendants, Watson and children, Bartlett and wife, and W. H. Jones, even if they should find the location of the Basquez as

claimed by plaintiffs to be correct, (Record, pp. 62 to 89,) and that in his refusal so to charge, and in his instruction, "that if they (the jury) were satisfied from the evidence that the original testimonio of the plaintiffs title had been recorded in the county where the lands in controversy were situated, and the tract purporting to be conveyed by the testimonio had been actually run upon the ground, the defendants could not claim as purchasers in good faith without notice," (Record, p. 88.) there was error.

There was evidence tending to prove that the original *testimonio* of plaintiffs' titles was, in April, 1841, long prior to the purchase by defendants' ancestor, recorded in the proper office of Robertson county, Texas, within which county the lands were then situate, and that a possession had been held thereunder, together with payment of taxes, for more than five years. (Record, pp. 88 and 37.) *

This, under the authority of

Birney *v.* Fagan, 16 Tex., 391; Howerton *v.* Holt, 25 Tex., 50; and Wilson *v.* Williams, 25 Tex., 64,

was sufficient to give notice of plaintiffs' elder title and deprive defendants of the defense of innocent purchasers. Besides, the bill does not purport to give all the evidence applicable to the instruction asked, as will be seen from the charge of the court, where it is said that plaintiffs offered evidence tending to show that at an early day, before any controversy had arisen, there existed in the neighborhood a reputation as to the boundary, and that a rough map made by Johnson, but now lost, would show the identity of the upper line of the Basquez with that of the reserve. (Record, p. 27.)

VIII.

The verdict of the jury (Record, p. 18) was responsive to the pleadings, the issues, and the charge of the court. It found, substantially, that all the land claimed by plaintiffs was

*Also that before any possession taken by the defendants of any part of the land, the tract conveyed to plaintiffs by the original title was actually run upon the ground, and that defendants had notice of the then title and location of plaintiffs' lands. (Rec., 87 & 88, at top of page.)

covered by their title, and that none of the land claimed by the defendants was protected by their titles or possession. This was tantamount to a specific finding that the conflict between the Basquez grant and the portions of the John Marlin and Sanchez grants claimed by defendants was entire, and embraced all the land for which they defended.*(a)

As the Revised Statutes of Texas took effect September 1, 1879, nearly three years after the trial of this cause, we fail to see what effect the extracts therefrom contained in brief of opposing counsel can have upon this case, even if pertinent. (Rev. Stats. Tex.)

The judgment should be affirmed.

Respectfully submitted,

S. R. FISHER,
Of Counsel for Defendants in Error.

(a) Flournoy v. Lastrapes, No 186, Oct. T. 1898, not yet reported, is decisive of this point.

* NOTE 2.—The main issue was not, as contended by plaintiffs in error, "How much of the defendants' land, if any, is covered by plaintiffs' grant;" but was, as will be seen, from the pleadings and the charge of the court—Rec., 1 to 17; and Rec., 25—"Does the Basquez grant, under which plaintiffs claim title, cover the lands described in their petition;" or, as stated by the Court, in its charge, Rec., 25, "*Have the plaintiffs shown title to the land described in their petition.*"

The subordinate issues, arising out of a finding of the main fact in favor of the plaintiffs in the court below, were

1. Are defendants protected by their pleas of the statute of limitations;
2. If not so protected, then, what improvements, if any, have the defendants made and what is the value thereof;
3. What is the value of the rents and profits of the lands so improved; and
4. What is the value of the improved lands, irrespective of their enhanced value by reason of the improvements.

The general finding in favor of the plaintiffs, the defendants having failed to establish title or make out a bar as to any of the land lying within the boundaries of the demanded premises, is as certain and definite as if the jury had set out in their verdict a particular description of the land taken from the petition.

Had the jury found that any part of the lands in controversy—those in conflict with plaintiffs' title—belonged to the defendants, then a different question would have been presented, and a definite description by metes and bounds, of the lands awarded to each party, might have been necessary. But the fact that the jury awarded to each defendant, the value of his improvements on so much of the land as he had suggested improvements upon, is a conclusive finding against them as to the title and right of possession.

It is immaterial but later to divide for the first time in this Court. The objection should have been made in the Court below in the motion for new trial or by motion in arrest

OFFICE SUPREME COURT U. S.
FILED
MAR 19 1880
D. W. MIDDLETON, Clerk.

IN THE
SUPREME COURT of the UNITED STATES

No. ~~809.~~ 227

W. S. HUNNICUT, ET. AL., Plaintiff in Error,

VS.

BAILIE PEYTON, ET. AL., Defendants in Error.

Error to the Circuit Court of the United States, for the WESTERN DISTRICT OF TEXAS.

Tried before the HON. WM. B. WOODS

Waco Examiner Steam Job Printing Establishment.

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STATEMENT OF THE CASE.

On the 25th day of August, A. D. 1874, the Defendants in error filed their suit against the Plaintiffs in error, and others, to try the title to a certain tract of four leagues of land, described in their original petition or declaration as follows, viz :

"Four leagues of land on the east bank of the Brazos river, "known as the Gregorio Basques survey of four leagues, situated "about four leagues below a survey of seven leagues, made also for "said Gregorio Basques, the two composing and being his grant or "concession of eleven leagues of land from the State of Coahuila "and Texas, said four leagues of land being more particularly "described as follows, viz : Beginning at a stake marked P on said "left bank of the Brazos river, running from thence North 71 degrees

'East 10,200 varas, to a creek called Isaac creek, and at 20,200 varas "to a stake set for the second corner, thence South 19 degrees, 5000 "varas, to another stake for the third corner; thence South 71 "degrees West, 18,320 varas, crossing again the aforesaid creek, to a "stake on the Brazos river for the fourth corner; thence up the river "to the place of beginning, covering an area of four leagues of land "or their equivalent 100,000,000 square varas of land, fronting on "said river, and bounded on the three remaining sides, as stated in "said grant when made by the public domain."

The petition was in the usual form, alleged seizin of the Plaintiffs, the entry and trespass of the Defendants, and prayed for recovery of the land.

The Defendants, Webb, Killebrew, Barnes, Kelley, Cockrell, Frazier, Johns, Everett, Van Rosenberg and W. R. Reagan filed general demurrers, and pleaded the general issue of not guilty.

W. H. Jones was made Defendant by supplemental petition filed June 5th 1875.

On the 6th of June, 1876, the Defendant, W. H. Jones, filed his separate answer:

First. He objected, specially, that Plaintiffs' petition contains no sufficient and certain description of the land sued for.

Second. He pleaded general denial.

Third. Not guilty.

Fourth. He set up title in himself to a tract of 995 acres of land which is particularly described, and pleaded in bar his adverse possession for three, five and ten years.

Fifth. He also pleaded in bar his adverse possession for forty years claiming by lines and boundaries, well known and defined, and by permanent and substantial enclosures, and set up title by limitation and prescription.

Sixth. He also set up possession in good faith and pleaded improvements.

The Defendants, Irene May, Carrie and Churchill A. Watson minors, by their guardian, A. E. Watson, and A. E. Watson for himself, filed similar defences as to the tract claimed by them.

The Defendants Zenas Bartlett and wife, Sallie K. Bartlett, filed similar defences as to the tract held by them.

February 5th, 1877, Plaintiffs filed their amended petition, in which the land sued for was described as "Beginning at a stake "marked P on the East bank of the river Brazos, in the county of "Falls, State of Texas, at the point where the upper line of the "Austin & Williams reserve, on the East side of said river, inter- "sects said river, running thence with said upper line of "the reserve, North 71 degrees, East, 20,220 varas, to a "stake and crossing Isaac's creek; thence South 19 degrees East 5000 "varas to another stake for the third corner; thence South 71 degrees "West 18,320 varas, crossing again the aforesaid creek to a stake on "the Brazos river for the fourth corner; thence up the river to the "place of beginning, covering an area of four leagues, fronting on "said river, and lying within said Austin & Williams' reserve im- "mediately below and adjoining said upper line of said reserve."

The same paper also contained a replication to Defendant's plea of the statute of limitation.

The cause was submitted to a jury, and February 17th 1877, they returned a verdict as follows, viz:

"We, the jury find for the Plaintiffs, and assess damages and rents at two dollars per acre per annum from date of suit, August 24th, 1874, to February 17th 1877, making two years, five months and twenty-four days, against the following Defendants, viz: A.E. Watson and children for four hundred acres, one thousand, nine hundred and eighty-one dollars, and thirty-seven cents ($1981.37); Z. Bartlett and wife, Sarah K. Bartlett, for one hundred acres, four hundred and ninety-five dollars and thirty-one cents ($495.31); W. H. Jones, for thirty acres, one hundred and forty-seven dollars and eighty-four cents ($147.84). We allow said Defendants A. E. Watson and children, Z. Bartlett and his wife, Sarah K. Bartlett, and W. H. Jones, for improvements on said land, to-wit: A. E. Watson and children, nine thousand dollars ($9,000.00); Z. Bartlett and his wife Sarah K. Bartlett, two thousand dollars ($2000.00); and for W. H. Jones four hundred dollars ($400.00). We further value said land occupied by said Defendants at ten dollars per acre without improvements. W. W. Archer, Foreman.

Upon which verdict judgment was entered and is now before this Court for revision and correction of alleged errors.

Several Bills of Exception were taken in the course of the trial to the admission of testimony to portions of the charge of the

Court, and to the refusal of charges asked by the Defendants. Objection is also made to the uncertainty of the verdict, all of which are the basis of the following:

ASSIGNMENTS OF ERROR.

First. The Court erred in admitting the several papers set out in Defendant's first Bill of Exceptions, and holding that the same vested legal title in Johnathan C. Peyton. 4 4 31-37

Second. The Court erred in admitting said papers in evidence, because the same did not identify and describe any certain and definite tract of land. 4 4 31-37 Rec 5

Third. The Court erred in admitting the testimony of the witness Horatio Chrisman, as set out on pp 38 and 41 of the record, because the same is hearsay testimony, and not competent to prove the specific fact sought to be established, viz:. That the Basques grant was in fact surveyed by Moore, on the reserve line or at any other particular place. (See Bill of Exceptions, No. 2, pp 38 and 41 of the record.)

Fourth. The Court erred in admitting the testimony of Horatio Chrisman, wherein he undertakes to tell what Moore told him about the location of the Austin & Williams reserve line and the Bosques grant, particularly wherein the witness says, in said deposition * * * He (meaning William Moore aforesaid) informed me, in 1834, that he had made the survey of the said four-league Basques grant; that the upper line of said grant began on the east side of the Brazos river, at the point where the upper line of the reserve began; and that the upper line ran North 71 degrees East, with the reserve line, the full distance of the Basques line; and that the upper line of the Basques and the upper line of the reserve were the same to the extent of the Bosques line—because there is no proof that the upper line of Austin & Williams' reserve was ever, in fact, run, or was ever required by law, order, or decree to be run, and because there is no call in said Basques' grant for said line; and because said witness does not state that said Moore ever pointed out the place on the ground where he had run either the Basques line or the said reserve line; and because the testimony is hearsay. (See Bill of Exceptions, No. 3, pp. 41, 42.)

Fifth. The Court erred in admitting in evidence the two documents set out in Defendants' fourth Bill of Exceptions, (See pp. 43, 44 of the Record) for the reasons mentioned in said Bill.

Sixth. The Court erred in refusing to charge the Jury as requested by Defendants' counsel, as set out in Bill of Exceptions, No. 5. (See pp. 45–60 of the Record.)

Seventh. The Court erred in the charge to the Jury on the question of limitation, and in refusing to give the charge asked by Defendants. (See Defendants' sixth Bill of Exceptions, p. 61 of the Record; also copy of the charge, p. 30.)

Eighth. The Court erred in refusing the charge asked by Defendants upon the facts set out in seventh Bill of Exceptions—pp. 62–88 of the Record.

Ninth. The Court erred in rendering judgment on the verdict of the jury, because the same is indefinite, uncertain, and does not find the main issue in the case, viz: How much of the Defendants' land, if any, is covered by the Plaintiffs' grant. (See the verdict, p. 18 of the Record.)

A preliminary question arises upon a Bill of Exceptions reserved by the Plaintiffs. (See pp. 88, 89.)

The Defendants' Bills of Exceptions were signed by the Judge and filed in the cause during the term at which said cause was tried, but more than five days after trial—the verdict having been rendered February 17th and the Bills signed February 28th.

The Plaintiffs' counsel, being present at the signing of said Bills, objected on the ground that they were not presented to the Judge within the time limited by Rule 33 of the Court, which Rule reads as follows:

"No Bill of Exceptions will be signed unless presented to the Judge within five days after the close of the trial, unless further time be allowed by the Court. Provided that all Bills of Exceptions shall first be submitted to the opposing counsel, if he be in attendance at the term of the Court."

It appears that said Rule was adopted by order of the Court, dated June 13, 1872.

The same objection was made to the order of the Court extending the time for signing and filing said Bills.

In answer to the objections made, it is sufficient to say that no error appears in such proceeding, unless it be held that the Court has power to make a rule for itself which shall bind the Court to

its exact performance, under all circumstances and upon all occasions.

The facts which led the Court, in this instance, to vary the Rule are not shown in the Bill of Exceptions, but were deemed sufficient by the Judge presiding at the trial and by the Court. (See p. 22 of the Record.) It does not appear whether the delay was occasioned by the counsel for Plaintiffs or counsel for Defendants.

See the case of Muller, et al., vs Ehlers, 91 U. S., 250, and cases cited in which the Rule in ordinary cases is stated to be that Bills of Exception should be signed and filed during the term at which the cause was tried. And it is in the power of the Court to vary a Rule of Court, in order that justice may be done. See, also, Stanton vs. Embry, 93 U. S., 552, and cases cited.

ARGUMENT.

In support of the first Assignment of Error: The attention of the Court is respectfully called to the several papers composing the title of Defendants in Error.

The papers, taken together, show substantially that on the 28th day of September, A. D. 1830, one Gregorio Basques applied to the Governor of Coahuila and Texas for a grant of eleven leagues of land; that on the 11th of March, 1831, an order was made, by the Governor, conceding the grant and directing the Alcalde of the respective jurisdiction in which the land was situated to have the land surveyed and to issue proper title of possession. (pp. 32, 33.)

That on the 20th of September, 1831, the said Gregorio Basques appeared before the Alcalde of the town of Nacogdoches and executed, in due form, a power of attorney, appointing and authorizing one Hartz to solicit and obtain title, by virtue of said concession, in the place or places that best suit him, etc. (pp. 31, 32.)

That on the 22d day of September, 1831, the said Basques executed an act of sale, transferring said concession to said Hartz. (p. 33.)

That on the 2d of March, 1832, said Hartz, in proper form, substituted Jonathan C. Peyton, Plaintiff's ancestor, to be Attorney for said Basques (p. 34), and on same day executed an act of sale, transferring said concession to said Jonathan C. Peyton (p. 35); and that afterwards, viz, October 7th, 1833, a title of possession, by virtue of said concession to Gregorio Basques, was issued, the

said title being solicited by his Attorney, Jonathan C. Peyton. (pp. 36, 37).

[Through some error, not observed until now, the report of the Surveyor, giving the field notes of the land, has been omitted in the first Bill of Exceptions, and I ask leave to refer to pages 45 and 46 of the Record, where will be found the application for the survey and the report of the Surveyor, which is referred to in the final title.]

We refer, also, to the statement of the chain of title contained in the charge of the Court, beginning near the bottom of page 24.

We hold that said papers, if evidence at all, show legal title in Gregorio Basques; and that the right asserted by Plaintiffs is cognizable only in a Court of Equity.

The concession was to Gregorio Basques, and the final extension of title was to him, and no deed appears from him. (See the case of Hanrick vs. Barton, 16 Wall, 167–171; Sheirburn vs. Cordova, 24 How, 423).

The act of sale executed by Basques to Hartz and by Hartz to Jonathan C. Peyton, after the date of the concession and previous to the extension of final title, could not have the effect to vest legal title in Jonathan C. Peyton; because

1. The title was subsequently perfected in Basques, and not in the Assignee; and

2. We conclude that it was not intended that title should vest in the Assignee, because forbidden by Section 24 of the colonization law of Coahuila and Texas, of March 1825, which reads as follows, viz:

"The Government shall sell to Mexicans, and to them only, the lands they shall wish to purchase; but shall take care that there shall not be united, in the same hands, more than eleven leagues, and subject to the condition that the purchaser shall cultivate those he shall acquire, by this title, within six years from the acquisition, under penalty of forfeiting the same."

2 In support of the second Assignment of Error: It appears that the description of the land sued for, as stated in the title, furnishes no means for its identification. The final title (p. 37) refers to the notes of the survey made by the principal scientific Surveyor, Fran-

cis W. Johnson, for description of land granted. The notes, are in substance, as follows:

The lands that I have surveyed, etc., etc., are situated upon the Brazos river above the San Antonio road, in the following form, viz, Seven leagues on the left margin of said river, above and adjoining a survey of four leagues I have surveyed for Jose Antonio Manchaca, and four leagues upon the same margin of the river, *about* four leagues below that of first survey.

(Here follows field notes of seven leagues not in controversy.)

"The second survey of four leagues has the situation, limits, "lines and corners as follows, viz:

"Situated upon the left margin of the Brazos river, and beginning "at a stake upon said margin, marked 'P;' from thence North 71 "degrees East, and at 10,200 varas crossed what is called Isaac's "creek; and at 20,200 varas set a stake for the second corner; from "thence South 19 degrees East 5,000 varas,and to where set another "stake for the third corner; from thence South 71 degrees West 18,- "320 varas, again crossing the aforesaid creek to the River Brazos, "where set another stake for the fourth corner; from this point up "the river, with the meanders of the same, to the place of beginning "and containing an area of four leagues of land, or, which is the "same, 100,000,000 of square varas, bounded by the river and on its "other sides by vacant lands, and, to the best of my knowledge, is "composed of 18,750,000 square varas or, which is the same, three- "fourths of a league of arable, and 81,250,000 of square varas or, "which is the same, three and one-fourth leagues of pasture land, "its figure is that shown in the accompanying map." (See p. 46.)

No map accompanies or is attached to the title, but the form of the survey is apparent from the field notes.

No artificial monuments are called for in the title, except the stake marked P, and no natural objects are mentioned, for its identification, except the margin of the Brazos river and the distance from said river to Isaac's creek.

That this survey is to be found about four leagues below the seven league survey we also learn from the grant. This call is vague and indefinite. The Court in discussing the word "near," as a locative call in the case of Ruis vs. Chambers, 15 Texas, 592 and 593, say "mere proximity to another place specified would afford no guide for the direction of others in selecting their lands * *

* and consequently having no identity or means by which it could be identified, it must be without force or effect."

It is certainly the duty of the Surveyor to run around the land intended to be embraced in the survey and patent, and see that such objects are designated on it as will clearly point out and identify the locality and boundaries of the tract, and to extend a correct description of these objects, natural or artificial, into the field notes of the survey, in order that they may be inserted in the patent so that the owner, as well as other locators, may have the means of knowing precisely what land is granted. And if the land can not be identified by the calls in the grant it is void:

Henshaw vs. Bissell, 18 Wall, 263, Booth v. Stephenson
Guilbean vs. Mays. 15 Texas, 417, 26 Tex
Deery vs. Craig, 10 Wall, 269-270, Chenowith v. Hasskell
Boardman vs. Reed, 6 Pet., 345. 3 Pet. 92

The concession to Basques authorized him to appropriate eleven eagues out of the public domain, and was sufficient authority to the local officer to sever that quantity from the vacant public domain, and put the party in possession of the land so appropriated; and when this is done, the floating right, evidenced by the concession, attaches to a certain specified locality, and title is complete:

Hanrick vs. Barton, 16 Wall, 170,
Graham vs. United States, 4, Wall, 260.

If it be conceded that the map found on page 57 of the amended record properly belongs to the title, it does not give any aid in identifying the locality of the grant. The map shows no connections with other surveys, and could readily be made from the field notes by any one.

In the case of McIver vs. Walker, (9 Cranch, 173), the survey called to begin at a box elder tree, and called for course and distance for the boundaries, and referred to the map attached. The Court say in that case that they are able to fix the locality by the map.

3 In support of the third and fourth assignments of errors, which may be considered together, we maintain that the objections urged in the Court below, to depositions of the witness Horatio Chrisman should have been sustained.

Because, first, the testimony was hearsay; and, second, because

by said testimony, no attempt is made to identify any object on the ground as the same called for in the grant.

The testimony of the witness is set out in the Bill of Exceptions pp 38 to 42, and is set out in full in the amended record filed in obedience to the writ of certiorari; and upon an examination of the same it will appear:

First. That the witness was not present when the alleged survey was made.

Second. Nor were any lines pointed out to him by any person as the lines of said survey.

Third. Nor was the "Reserve line" ever seen by him.

Fourth. Nor does he pretend to know anything concerning the alleged survey, of its location or that such a survey was in fact ever made, except from information derived from one Wm. Moore in 1834 several months after the date of the final title.

The witness also refers to a map attached to his deposition, which he says is not a correct representation of the location of the Basques. He also says said Basques survey was not mapped under his direction, nor did he have anything to do with said survey or field notes; and it fully appeared that his knowledge of the location of said survey is derived from what Moore told him in connection with the further facts, that he understood that the Austin & Williams reserve extended up and down the river, a distance of 60,000 varas; that the Ruis survey on the lower line was 5,000 varas in width, and that he surveyed, beginning on said Ruis line, 48 labors of land, each having 1,000 varas front on the river, and hence that if the said Basques survey had been made on the upper line of said reserve, and having a front of 5,000 varas, there must be 2,000 varas between said Basques and survey No. 48 made by him.

In Ellicott vs. Pearl, 10, Pet., 438, this Court says: "that in order "to authorize the admission of hearsay evidence, (except in cases of "pedigree) three things must generally concur: First, that the fact "to which the reputation or tradition applies, must be of a public "nature; secondly, if the reputation or tradition relate to the ex- "ercise of a right or privilege, it must be supported by acts of en- "joyment or privilege, within the period of living memory; thirdly, "that it must not be reputation or traditionary declarations to a par- "ticular fact; and a number of authorities are cited by the Court in "support of the doctrine."

The particular fact to be established in the case just referred to was the location of a corner and line of Remey's original survey. "The evidence of a witness was offered to prove that one Moore whose "name was put down as one of the original chain carriers, was dead, "and that he attended with the witness about twenty-four or twenty- "five years ago, when Charles Smith run from the mouth of Pond "creek, to the white oak tree; and also run the line North from the "mouth of Pond creek, and while at the corner and running the line "he declared that to be the corner made by Kincaid, (the surveyor) "and the line run by Wilson, by the direction of Kincaid for Remey's "original survey."

This testimony was objected to in the Court below, and the ruling was sustained in this Court in an opinion which contains a full discussion of that class of evidence.

The evidence of the witness Chrisman, which was admitted by the Court in the case at bar, is very similar to the testimony rejected in the case cited. The evidence was offered and admitted to prove a specific fact, viz: "That Basques grant was actually surveyed, and that it was so surveyed that its Northern boundary line would be identical with the Northern boundary line of the reserve. This is the declaration of a single individual, made to the witness more than forty years before the day he was called upon to testify. If it be granted that his recollection is good, and that he testifies to the truth, no authority, it is respectfully submitted, can be shown which would authorize the admission of the testimony. (See Shutte vs. Thompson, 15, Wall, 162).

But conceding that the objection that said testimony is hearsay, is not well taken there is still a fatal objection to the testimony.

It is well settled that a grant must be identified by its own calls:

Anderson vs. Stamps, 19, Tex., 460
Welder vs. Carroll, 29, Tex.
Dr. Leon vs. White, 9, Tex., 606.
Williamson vs. Simpson, 16, Tex., 439.
Boardman vs. Reed, 6 Pet. 345
Shipp vs. Miller, 2 Wh., 316.
Johnson vs. Pannel's heirs, 2 Wh., 211.
Chinoweth vs. Haskell, 3 Pet., 92.
Brantley v Lawrence
1 Douglass (Mich) 19

Adams v Swanson 116 Mass 353
Long v Colton 41 41
Hall v Long 97 Mass 416

Upon referring to the grant in this case, it will be found that it contains no call for the "Reserve line." The Judge in his charge to the jury, calls their attention to this fact, and it may be assumed as a question undisputed and recognized by the Plaintiffs, that no evidence can be produced, identifying the land now claimed by them, as the same land described in their grant; (see the many discrepancies mentioned in the Judge's charge) and this witness is called, not to identify any of the calls in the grant, but to add by his recollection, a call to the grant by means of which, alone the survey may be established, although every call in the grant should be thereby contradicted:

McCoy vs. Galloway, 3 Ohio, 282.
McAfferty vs. Conover, 7 Ohio State, 99.
Welder vs. Carroll, 29 Tex.
Phillips vs. Ayres, 45 Tex.
Booth vs. Upshur, 26 Tex., 64.
Carpenter vs. Montgomery, 13 Wall., 493-4.
Meredith vs. Picket, 9 Wh., 575.

Fifth. The Plaintiffs in the Court below, for the purpose of locating their grant, offered in evidence, the report of a board of surveyors appointed by an order of the District Court of Falls County, in a suit therein pending, wherein Rhoda B. Huckins was Plaintiff and J. C. Pool was Defendant; also a report of survey made by order of the Court in another suit, which the Court allowed to be read to the jury over the objections of the Defendants.

The said reports are at best hearsay, and declarations made pending a contest involving the very question. Said reports constituted part of the proceedings in suits to which these Defendants were neither parties or privies. These declarations might be admissible as against the Defendant Hunnicutt, providing he had at that time any interest in said land to be effected. An examination of said papers will show that no facts are found by said reports, but it is contended that their tendency was to mislead the jury, and it was error to admit them over Defendant's objections.

Sixth. The Plaintiffs in error, Watson, Bartlett and Jones, showed title in themselves severally to the lands, occupied by them, by transfer from John Marlin, who received from the government of Coahuila, and Texas a grant of one league of land as a colonist in 1835. They also showed title in themselves by transfer from Jose

M. Sanches, who received a grant in sale from the governments of Coahuila and Texas. The concession to the said Sanches was issued December 20, 1830. The title of possession was issued October 19, 1833, (see pp 57, 58). The Defendants, also, in connection with said Sanche's title, produced in evidence, a copy of the original field notes of the survey made for said Sanches, certified from the General Land Office of the State, from which it appeared that the land now claimed by said Defendants was surveyed January 12, 1833, (see pp 59, 60).

The final title issued to Basques, under whom Plaintiffs claim, is dated October 7, 1833, (see pp 48).

The original survey of the Basques was made May 11, 1833, as appears by a certified copy of the original field notes, (see pp 86).

These facts all appearing in testimony, counsel for said Defendants asked the court to charge the jury that the survey by virtue of the concession to Sanches having been made previous to the survey by virtue of the concession to Basques, constituted the Sanches title, the best title.

This principal is well settled in Texas, see
Hollingsworth vs. Holshausen, 17 Texas 44.
Warren vs. Sherman, 5[illegible] Texas, 441.
See, also, Landes vs. Brant, 10 How. 373.
Miller vs. Dale, 92 U. S. 477.
Henshaw vs Bissell, 18 Wall 267.

LIMITATION.

Seventh. It appears in Defendants' sixth Bill of Exceptions, p. 61, that the Defendants, Watson, Bartlett and Jones, after having shown title in themselves to the several tracts of land claimed by them in their pleadings, by regular transfer from the sovereignty of the soil, introduced evidence tending to show that in 1855 or 1856 their ancestor, Churchil Jones, took actual possession of that part of the John Marlin league which conflicts with the Basques grant, and built a mill and other improvements thereon, which possession has continued exclusively in Defendants and those under whom they hold; and that *after* the entry by Defendants' ancestor, viz, in April, 1858, the ancestor of Plaintiffs entered on the said Basques grant (but not on the conflict with the land covered by Defendants' titles), and made a lease to one James Marlin, permit-

ting him to occupy a tract of 320 acres, on which the said James Marlin then resided, and has so continued to hold as the tenant of Plaintiffs and their ancestor. (See, also, the statement contained in the charge of the Court, p. 30.)

Upon this state of facts the Defendants' counsel asked the Court, in substance, to charge the jury that if they believed from the testimony that the ancestor of Defendants entered on that part of the John Marlin league which is in conflict with the Basques at any time before the Plaintiffs or their ancestor made an entry on said Basques, and that said Defendants and their ancestor had so remained in said possession of the lands claimed by them for three years or more before the institution of suit by Plaintiffs, then you will find in favor of the Defendants, Watson, Bartlett and Jones, on their plea of limitation.

The statute upon which the charge is based is as follows:

"Every suit to be instituted to recover real estate as against him, her or them in possession under title or color of title shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. * * * * By the term title, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil." * * * (See Sec. 15 of the act approved February 5, 1841; Paschal's Dig. Laws Texas, Art. 4622).

By Section 14 of same Act, (see Paschal's Dig., Art. 4621) It is provided that

"Peaceable possession, within the scope of this Act, is such as is continuous, and not interrupted by adverse suit to recover the estate."

Admitting the Basques grant to be the oldest title the ownership of said title gives, a constructive possession, or seizin, to the owners, the land being vacant or unoccupied.

"Generally in this country, certainly in this State, seizin means ownership, and the distinction between seizin in deed and in law is not known in practice."

"The right thus drawing to it the legal seizin and possession of the owner, *per se*, he remains possessed until disseized by possession taken and held adversely by another." (See the case of Whitehead vs. Foley, 28 Texas, 283–4.)

From this doctrine, it results that the owner is disseized or dispossessed by an adverse possession only to the extent and within the limits of the possession taken and held adversely.

A mere trespasser, who enters without claim of right, holds only to the extent of his actual occupation, and the owner is therefore disseized only to that extent.

But one who enters, claiming right by virtue of a paper title, his entry and occupation is referred to his title, and is bounded and limited by it.

These principles are well settled; see the following cases:
Horton vs. Crawford, 10 Texas, 388.
Whitehead vs. Foley, 28 Texas, 268.
Wheeler vs. Moody, 9 Texas, 377.
White vs. Burnley, 20 How, 235.
Clark vs. Courtney, 5 Pet., 319.

In the case at bar, it appears that at a time, viz, in 1855 or 1856, when the Basques grant was entirely unoccupied and the owners had constructive possession, or seizin only, the ancestor of Defendants entered on said land, covered by said grant, by virtue of his title, viz, the John Marlin league title, and erected thereon a mill and other improvements; and that said possession has continued exclusively in Defendants and their ancestor. This entry constituted a disseizin of the owner of the Basques and gave him an immediate right of action, and put the Statute of Limitation in motion.

Nor did the subsequent entry of the owner of the Basques on his grant, *but not* within the bounds of the Defendants' title, interrupt the Defendants' possession, although the full term of three years had not then elapsed. Had the owner of the Basques, within three years after Defendants' entry, made his entry on his grant and within the bounds of Defendants' title, it would present a case of conflict of title and possession, and the right would remain with him who had the best title. (See the case of Clark vs. Courtney, 5 Pet., 353–4–5, cited and approved by the Court in Hays and Calvert vs. Barron, 26 Texas, 81–2.

How far the language of our statute, defining peaceable possession (ante) might be held to vary this rule it is unnecessary to inquire, because it does not appear that Defendants' possession was

interrupted or the operation of the Statute of Limitation suspended by either entry or suit, previous to the institution of this suit.

Referring to the charge of the Court which was excepted to, it will be found that the principles announced by the Court are in direct conflict with the above authorities. It is there stated to the jury that "if a party has entered into possession of a tract of land and the statute has begun to run in his favor, the running of the statute will, of course, be interrupted by an interruption of the possession, *either actual or constructive.*" (See p. 30.) That there was any actual interruption of the possession of the Defendants is not pretended.

A constructive interruption of the Defendants' possession was, therefore, what was in the mind of the Court, and what facts were sufficient to constitute such constructive interruption are also stated by the Court, as follows, viz:

"But the Plaintiffs claim that in May, 1857, before the Defendants had been in possession for the period of three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basques grant of James Marlin, as the agent for Mrs. Eberly."

"If you find this fact to be as the Plaintiffs claim—that James Marlin entered upon the Basques grant in 1857, as the agent for Mrs. Eberly, claiming title to the whole in her name, we instruct you that from that time the possession of the Defendants, they holding under a junior title, was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper title."

That the adverse possession of the Defendants would have been sufficient to constitute a bar under the statute seems to have been conceded, except for the *constructive* interruption of said possession caused by a subsequent entry of the Plaintiffs on their grant, but not on that part conflicting with Defendants' title.

There is no doubt that under our statutes the Defendants' possession would have been interrupted by the institution of a suit against them by the owners of the Basques grant, having for its object the recovery of the land, and the running of the statute would be thereby suspended. (See Sec. 14, Act of 1841, before recited.)

Whether an entry on the conflict by the Plaintiffs would have

been equivalent to a suit, may well be doubted, in view of what constitutes peaceable possession, as defined by our statute. Certainly, if an entry is to take the place of a suit, it must be upon the premises held by the Defendants, and sufficient in law to constitute an ouster or disseizer. It would be quite a new principle in the law of ejectment and limitation that the intention to assert the right was equivalent to its being actually done. If this principle were to hold in this cause, the possession of the old pioneer, John Marlin, on his headright league outside of the conflict, would long since have perfected his title.

As to the fact of entry by Plaintiffs:

Referring to the Bill of Exception, we find that the ancestor of Plaintiffs entered on the Basques grant, but not on the conflict with the lands covered by Defendant's title, and made a lease to one James Marlin permitting him to occupy a tract of 320 acres, on which the said James Marlin then resided, (see pp 61). Referring to the amended record sent up in obedience to the writ of certiora ri, (pp 16, 17), is a copy of the lease referred to in the bill.

It further appears in the bill, "But the Plaintiffs claim that in May, 1857, before the Defendants had been in possession for the period of three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basques grant, of James Marlin, as agent of Mrs. Eberly. On pp 15 and 16 of the amended record, is a document styled a Power of Attorney, and dated May 28, 1857. We think it may be assumed as evident from the bill, taken in connection with the two documents, that before the date of this execution James Marlin was in possession of a tract containing 320 acres of land, claiming some right in himself, and that the extent of his possession was not enlarged, or intended to be enlarged by said instruments, but remained limited by the boundaries of said 320 acre tract. If he accepted the lease, the character of his occupation was changed, and he thereafter held in subordination to Plaintiff's title. There was no visible, open, notorious change in his possession giving to these Defendants any notice of an entry on part intending to claim the whole. The mere fact that Plaintiff's ancestor entered, and made a lease to part, shows no intention to disturb or interrupt the possession of Defendants. +

Seventh. A consideration of the next bill of exceptions which is made the basis of the 7th assignment of error will require a ref-

+ Kerr v Elliott Phillips (N.C.) 601
Ransom v Lewis 63 N.C. 43
Slade v Griffin 2 Hay. (N.C.) 178
Hole v Rittenhouse 25 Penn St. 491

erence to the history of the settlement of this section of the country.

In 1825, the government of Coahuila and Texas granted to Leftwick a large territory including what is now known as Falls county, for the purpose of colinization. He failed to perform his contract, and the government, in 1831, granted the same territory to Austin and Williams, for the same purpose. They proceeded to bring in settlers, and under their authority the best lands were surveyed, and titled in large tracts, by virtue of concessions of one or more leagues, in quantity made by the Governor. They continued in possession of the colony until 1834, when the grant to them was revoked, and the colony was restoredto Leftwick, or to the Nashville company who represented him. Immediately upon taking possession the agent of the Nashvillle company proceeded to make surveys and bring in settlers, disregarding the surveys and grants made under authority of their predecessors Austin and Williams. A glance at the map, p 143, will give some idea of the conflict of surveys resulting from this. (See the case of Houston vs Robertson, 2 Texas p 1.) The titles made under authority of Austin and Williams, in our section, are all dated in 1833; Nashville company titles are dated in 1835.

They constitute two distinct and independent systems of surveys, each in itself intended to be harmonious, but having no relation to ~~each~~ other.

The principal scientific surveyor of Austin & Williams's colony, Francis M. Johnson, was personally present on the trial in the court below, and testified in the cause. Many other witnesses were also examined touching the location of said Basques' grant, the substance of which is set out in the bill of exceptions beginning on page 61.

The testimony shows, first, the common understanding as to the location of said Basques' grant, previous to the date of any controversy, as derived from the best sources of information from the earliest settlement of the country, to this day.

Second. The plan and method of makiug the surveys under the authority of Austin and Williams, and the means of determining the location of the "Reserve Line."

Third. The repugnancy of the location as claimed by the Plaintiffs, as compared with the calls in their grant.

First. F. Pressler testified that he had held the position of draftsman in the General Land Office since 1846. He identified an old map, an archieve of said office, dated June 1839, and several other maps dated at intervals since, and the said maps were produced in evidence to the jury, from all of which maps it appeared that said Basques' grant was not mapped on the "Reserve Line," but some distance below it. That said grant had never been represented by the official maps, where the Plaintiffs claim it. The present map of the county was also in evidence, (see p 62), to which the attention of the Court is respectfully called. The Court will observe that by pushing the said Basques' grant up to the red line, marked "Reserved Line," said survey will conflict several hundred varas with the J. M. Sanches grant, which was surveyed and title issued by the same officers, at about the same date. The Basques title being dated October 7th, and the Sanches title being dated October 19th, of the same year.

The testimony of the witness Emeline D. Taylor, shows that Francis Smith lived on the Sanches grant before it was titled, kept a trading house there, and opened a farm on the same grant, and continued to occupy it until his death, in 1836; that the possession was continued by the guardian of his daughter, (the witness,) until she married and settled there herself, in 1846. She says she never heard of any conflict between the Sanches, and the Basques.

Judge Reagan testifies that he has lived in Falls county twenty years as a practicing lawyer, that prior to 1858, the Basques had no fixed boundaries at any particular place, and very little was said about it, and when it was mentioned at all, it was referred to as a grant on the map nearly where the old map placed it, which was below where the Plaintiffs now claim it. He testifies to being present when the board of surveyors met to make a survey under order of the court in the suit of Huckins vs. Pool, (see p 43 of the record). He testifies that no line was found, that about 6 miles out from the river some old marks or hacks were found on two or three post oak trees, that no other marks were found, although there was abundance of timber, and this line indicated by marks on two or three post oak trees was adopted for the reserve line. He testifies, also, to conversations with James Marlin, previous to 1858.

The testimony of Geo. T. Robinson, is to the effect that he has lived in the vicinity since 1850, and owns land there. He testifies

to the possession on the John Marlin league, and the Sanches grant, in 1850. He says he knows nothing about the location of the Basques grant, except as represented on the old maps of the county, but it was never supposed, previous to 1857 or 1858, to be as high up the river as where it is now claimed by the Plaintiffs.

The testimony of B. Killebrew, is to the same effect, and to general reputation existing previous to 1858.

W. S. Poole testified he had lived in Falls county since 1851; that he was engaged with Pierson for two or three years surveying about the Falls of the Brazos, from 1857 to 1860, found no lines of the Basques, heard Pierson say that if it could not be located by the map, it could not be located; had a conversation with James Marlin, during the time Marlin said he had never seen any line marked for the Basques.

J. D. Oltorf testified. He is practicing lawyer in Falls county since 1854, that he never heard of any reserve line until a few years ago—about 7 or 8 years.

Gen. Thos. Harrison testified. He resided in Marlin, Falls county, in 1852, 1853, 1854 and 1855, lives now at Waco; that the location and the lines of the Basques grant were not fixed by any public notoriety or general reputation during the years of my residence at Marlin. The general and prevalent opinion was that it was below the John Marlin league. Its exact location was not known. It is hardly possible, certainly not probable, that I can be mistaken in this. It became my interest and my duty twice, once professionally and once on account of private interest of my own, to investigate that subject, and to possess myself of the best information in regard to it, and my means of information were ample and reliable. I knew, and was intimate with all the old settlers. The Basques grant was much spoken of when Wright bought in what purported to be the title of the heirs to the same. I must have heard many of the old settlers speak of it. I knew, personally, and had often conversed with the sons and sons-in-law of John Marlin, with Charley Smith, the first Chief Justice of Falls county, the Bartons, Barclays, Menefees, Wimberly, Morrell, the Pools, J. H. Pierson, son of the old Surveyor, and J. E. W. Pierson, himself a surveyor, and others, all old settlers, and some of them the earliest of the comrades of old John Marlin in the erection and defense of his fort, erected by him and them for protection against the Indians, the ruins of which,

I believe, are now to be seen on the land owned by Defendant Bartlett. I believe if the Basques grant had had known lines and limits I would have heard of them from some of these old settlers.

I have never seen the upper Reserve line, and can not say where it is, or how it is marked, or how its location is known. I do not remember to have heard of its limits, or the location of its lines during my residence in Marlin. I do not think it could have had any general reputation or notoriety during my residence there. I do not know that there was any diversity of opinion as to the location of the Basques grant at an early period. I do not think there was such during my residence at Marlin. I do not think any one pretended to know its precise location. The general impression was, I think, that it was below the John Marlin league. This impression may have obtained from the early maps, which there located it, as I remember.

It is respectfully submitted that the effect of this testimony is to show that from the earliest settlement of the country down to 1858 the location of the Basques grant was not known, and that no one had any knowledge of its location, except such as could be derived from an inspection of the county map, by which it was represented as situated somewhere down the river, below the John Marlin league. That adjoining proprietors occupied and improved their lands without any suspicion of a conflict with it. That the Reserve line had no notoriety; nor was its location known; nor can any marked lines now be found which might indicate that it had ever been run.

Attention is also respectfully called to the testimony of F. W. Johnson, from which it appears highly improbable that any actual survey was ever made for the Basques grant previous to the issuance of the title. The location of the Reserve line is also shown to be at a point some distance below where the map shows it.

R. R. Alexander, an old Surveyor of Falls county, testified that he knew the location of the Basques seven-league block, which lay above and adjoining the Manchacca grant; that he had measured the distance from said seven-league block to the line claimed by Plaintiffs, as the upper line of the Basques four-league survey, that the distance is 16,326 varas, 3, 700 varas less than the distance called for; that if the Basques field notes and distances are applied to the land claimed by Plaintiffs, there is found a discrepancy in the

call for Isaacs' creek of 1,430 varas, and in the call for the river, on the third line, there is a discrepancy of 1,656 varas—that is, the distance called for in said field notes would reach 1,656 varas across the river.

It is respectfully submitted that the effect of this testimony is to establish that no actual survey of the Basques grant was ever, in fact, made at any point, and that to place said grant where Plaintiffs now claim it would not be in harmony with any call in said grant, but would be wholly repugnant to every call in said grant; and we maintain that neither by the calls in the grant, by the official maps of the country, by actual knowledge of any man living, by common understanding, by tradition, by marked lines, nor by occupation or claim made previous to 1858,

did any man know, or have any means of knowing, that this vagrant grant would finally settle on the lands of the Defendants, located in good faith by the original grantees, purchased in good faith by Defendants' ancestor, occupied and improved at an early day, and held for forty years, and more, under an apparently good title. And therefore, we hold that the charge asked by Defendants' counsel, and refused by the Court, should have been given to the jury; and that the facts are strictly within the rule stated in Guilbean vs. Mays, 15 Texas, 410, which has been followed by this Court in a number of cases. (See

Airhart vs. Messieu, 98 U. S., 491,
Preston vs. Boman, 6 Wh., 580.

In support of the eighth Assignment of Error:

We maintain that the verdict of the jury is clearly and evidently insufficient to support the judgment.

It is apparent that the main and only real issue in the case was as to the locality of the Basques grant—in other words, how much of the Defendants' land was covered by the Plaintiffs' older title? The verdict finds, substantially, that both parties are the owners of the titles under which they respectively claim, but the line that shall divide the one from the other is as much the subject of controversy now as it ever was.

Hutchins vs. Bacon, 46 Texas, 41,
Stafford vs. King, 30 Texas, 276,
McArthur vs. Porter, 6 Pet., 205.

These authorities are directly in point, and fully sustain our position.

The following Articles of our Revised Code, regulating the pleading and practice in Actions of Trespass to try title, are referred to, as showing the pertinency of the above authorities.

The revision of our Code took place in 1879, but its provisions are substantially the same as those in force at the time this cause was tried:

ARTICLE 4784. All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements or other real property shall be by action of trespass to try title.

ART. 4785. The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the District Court, and conformably to the principles of trial by ejectment, except as herein otherwise expressly provided.

ART. 4786. The petition shall state—

1st. The real names of the Plaintiff and Defendant and their residence, if known.

2d. It shall describe the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered; and shall also state the county or counties in which the same are situated.

3d. The interest which the Plaintiff claims in the premises, whether it be a fee simple or other estate; and if he claims an undivided interest, he shall state the same and the amount thereof.

4th. That he was in possession of the premises, or entitled to such possession.

5th. That the Defendant afterward unlawfully entered upon and dispossessed him of such premises (stating the date), and withholds from him the possession thereof.

6th. If rents and profits or damages are claimed, such facts as show the Plaintiff to be entitled thereto and the amount thereof.

7th. It shall conclude with a prayer for the relief sought.

ART. 4787. The Plaintiff shall endorse on his petition that the action is brought as well to try the title as for damages.

ART. 4792. The Defendant in such action may file only the plea of "not guilty," which shall state, in substance, that he is not guilty of the injury complained of in the petition filed by the Plaintiff against him, except that if he claims an allowance for improvements he shall state the facts entitling him to the same, as provided in the succeeding chapter.

ART. 4794. Such plea, or any other answer to the merits, shall be an admission by the Defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only.

ART. 4805. Where the Defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance.

ART. 4806. Where the Defendant claims the whole premises and the Plaintiff shows himself entitled to recover part, the Plaintiff shall recover such part and costs.

ART. 4808. Upon the finding of the jury, or of the Court where the case is tried by the Court, in favor of the Plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the Plaintiff recover of the defendant the title, or possession, or both, as the case may be, of such premises, describing them, and, where he recovers the possession, that he have his writ of possession.

ART. 4813. The Defendant, in any action of trespass to try title, may allege in his pleadings that he and those under whom he claims have had adverse possession, in good faith, of the premises in controversy for at least one year next before the commencement of such suit; and that he and those under whom he claims have made permanent and valuable improvements on the lands sued for during the time they have had such possession, stating the improvements and their value, respectively; and stating also the grounds of such claims.

ART. 4814. Where the Defendant has filed his claim for an allowance for improvements in accordance with the preceding article, if the Court or jury find that he is not the rightful owner of the premises sued for, but that he and those under whom he claims have made permanent and valuable improvements thereon, being

possessors thereof in good faith, the Court or jury shall, at the same time, estimate from the testimony—

1st. The value, at the time of trial, of such improvements as were so made before the filing of the suit, not exceeding the amount to which the value of the premises is actually increased thereby.

2d. The value of the use and occupation of the premises during the time the Defendant was in possession thereof (exclusive of the improvements thereon made by himself or those under whom he claims), and also, if authorized by the pleadings, the damages for waste or other injury to the premises committed by him, not computing such annual value for a longer time than two years before suit, nor damages for waste or injury done before said two years.

3d. The value of the premises recovered, without the improvements made as aforesaid.

ART. 4817. In any action of trespass to try title when the lands or tenements have been adjudged to the Plaintiff, and the estimated value of the improvements, in excess of the value of the use and occupation and damages, has been adjudged to the Defendant, no writ of possession shall be issued for the term of one year after the date of the judgment, unless the Plaintiff shall pay to the Clerk of the Court, for the Defendant, the amount of such judgment in favor of the Defendant, with interest thereon.

ART. 4818. If the Plaintiff shall neglect, for the term of one year, to pay over the amount of said judgment in favor of the Defendant, with interest thereon, as directed in the preceding article, and the Defendant shall, within six months after the expiration of said year, pay to the Clerk of the Court, for the Plaintiff, the value of the lands or tenements, without regard to the improvements, as estimated by the Court or jury, then the Plaintiff shall be forever barred of his writ of possession, and from ever having or maintaining any action whatever against the Defendant, his heirs or assigns, for the lands or tenements recovered by such suit.

ART. 4819. If the Defendant or his legal representatives shall not, within the six months aforesaid, pay over to the Clerk, for the Plaintiff, the estimated value of the lands or tenements, as directed in the preceding article, then the Plaintiff may sue out his writ of possession, as in ordinary cases.

ART. 4820. The judgment or decree of the Court shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions contained in the three preceding articles, so far as they may be applicable to the case before the Court.

ART. 4821. Whenever payment shall be made to the Clerk of the Court by the Plaintiff or Defendant, as provided in the preceding articles it shall be the duty of such Clerk to enter a memorandum of such payment, with the date thereof, on the page of the Record on which the judgment was entered; and he shall, on demand, pay over the money to the party entitled, taking his receipt therefor, dated and signed on the page of the Record aforesaid.

Wherefore because of the many errors apparent in the Record, as well as for the errors assigned, the Plaintiffs in Error pray that the judgment rendered in this cause be reversed, and a *venirie de novo* be awarded.

L. W. GOODRICH,
Counsel for Plaintiffs in Error.

In Supreme Court of the U. S.

No. 227.

HUNNICUT, ET AL.

vs.

BALIE PEYTON, ET AL.

P. PHILLIPS,
Of Counsel for Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

The Bill of Exceptions.

The writ of error is tested and filed 24 February, 1877.

The bill of exceptions was signed on 28th February—four days thereafter.

If a party bring a writ of error before he has procured the judge's signature to his bill of exceptions, he will not be permitted afterwards to tack or append the bill to the writ of error.

1 Phil. on Evi. 313.

The lodging of the writ removes the case to the Appellate Court, and the court below has no longer any jurisdiction over it.

Muller vs. *Ehler*, 91 U. S., 250.

The 33d rule of the court is, "no bill of exceptions will be signed, unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court."

The judge, in signing, makes this statement:

"The foregoing bills were all presented to and signed by the judge on 28th February, 1877, and more than five days after the close of the trial of the cause.

The counsel for plaintiffs objected to the signing of said bills, at the time aforesaid, on the ground that they were not presented to the judge within the time limited by Rule 33, and on the ground that when said bills were presented for signature, no order of the court had been made extending the time for the presentation thereof.

Signed and sealed this Feb'y 28, A. D. 1877.

W. B. Woods,
U. S. Judge."

After the bills were signed, to wit, on the *1st March*, the

District Judge, Duval, entered an order that the defendants have until *the 1st of March* in which to present their bills of exceptions for the signature of the judge, and filing said bills in this court, and the time mentioned in rule 33 is, under the circumstances of this case, extended until March 1st.

Rule 33 provided for a contingency which would justify extension of time. An application for this purpose could be resisted on the ground of the unreasonableness of the time asked for. Its provisions therefore worked no hardship, and experience showed that they were necessary for the proper administration of justice.

But if the judge had the power to sign on 28 Feb'y, and thus disregard the rule, as would seem to have been decided in *U. S.* vs. *Breitling*, 20 How., 252, the question still remains whether it must not appear as if the bill had been reduced to form and signed during the trial.

In *Walton* vs. *U. S.*, it was objected that the bill of exceptions purports on its face to have been taken and signed after judgment.

As to this, the court say, "it is true that the bill of exceptions states that the evidence was objected to at the trial, but it is not said that any exception was taken to the decision of the court; so that, in fact, it might be true the objection was made, and yet not insisted on by way of exceptions.

But the more material consideration is that the bill of exceptions, itself *appears on the record* not to have been taken at all until after judgment."

The court then referring to the rule that if the exception is taken at the trial, it may be afterwards reduced to form and signed by the judge, adds this qualification: "But in all such cases the bill is signed *nunc pro tunc; and purports on its face* to be the same as if it had been reduced to form and signed during the trial; *and it would be a fatal error if*

it were to appear otherwise, for the original authority under which bills of exceptions are allowed has always been considered and restricted as to matters of exception taken pending the trial and ascertained before the verdict.

9 Wheat., 657.

See also *Shepherd* vs. *Wilson*, 6 How., 265.

In *Turner* vs. *Yates*, the above extract is cited at length as the doctrine to which the court has steadily adhered.

16 How., 29.

In *Stanton* vs. *Embry*, it is said the exceptions were taken at the trial, and the bill was signed and filed *nunc pro tunc*, which brings the case within the settled practice of Courts of Error.

93 U. S., 556.

If either of these grounds is sustainable, the judgment rendered must be affirmed, as there would be nothing in the record presented for revision.

The Title.

The plaintiffs claimed under a concession to Basquez of eleven leagues, in 1831, consummated by the extension of title October, 1833. p. 37.

The eleven leagues were surveyed in two tracts; one for seven leagues, the other for the four leagues involved in this action.

The declaration describes the land as situate on the left bank of the Brazos, beginning at a stake marked P, at the point where the upper line of the Austin and Williams reserve, on the east side of the river, intersects said river.

The same description is contained in the survey, except that no reference is made to the line of the reserve—the be-

ginning point P being described as about four leagues below the seven-league survey.

The motion to exclude the title-papers was overruled by the court. "It is claimed," say the court, "that the title-papers were void because of the vague description of the land they purported to convey—beginning at a stake marked P, on the left bank of the Brazos, about four leagues below the seven-league tract; but we are of opinion that if there had been an actual location of the grant upon the ground, the uncertainty of the deed would be cured thereby.

The plaintiffs cannot claim their four leagues 3,700 varas higher up the river than their title-papers would place it, unless their four leagues have been actually located, by actual survey, at the place where they claim it."

If the surveyor actually surveyed the four leagues on the ground, at a point 3,700 varas above the beginning point, called for by the title-papers, the mistake or inaccuracy of the surveyor would not vitiate the title, but the same would be good to the land set off to them on the ground by the surveyor, provided the same land had not already been appropriated by an older title.

The Court then told the jury: "You will proceed to inquire whether the Basquez four-league tract was actually surveyed upon the ground. The plaintiffs claim that it was. The defendants say it was not—and this issue you must decide." (p 26.)

The finding of this issue in favor of the plaintiffs is conclusive of the fact that there was an actual location of the four leagues, as claimed by the plaintiffs.

The questions, then, to be considered are—

First. Was the Court justified in submitting this inquiry to the determination of the jury?

Second. Did the Court err in admitting evidence offered to the jury to enable them to determine it ?

As to the *first*—

In the case of *Boardman et al.* vs. *Lessees of Reed et al.*, among the defendants' propositions were these :

5th. If there are no calls in the patent justifying the location of the land granted, as contended for by plaintiffs, they cannot succeed in establishing their claim by relying on extrinsic evidence.

6th. Proof that the land claimed in the action was surveyed for the patentee, by evidence contradicting the calls of the patent, does not establish the right of the patentee, and of those claiming under them.

Both propositions were overruled, and, in reference to the latter, the Court held that, taken as an abstract proposition, it may be correct; but that certain calls in a patent may be explained or controlled by other calls was settled in *Stringer's Lessee* vs. *Young*, 3 Peters; and if the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt.

6 Pet., 344.

It is to be remembered that the ruling of the judge, in admitting evidence as to the actual location of the four leagues, was subject to the condition that "the same land had not already been appropriated by an older title."

As to the Second—

The admission of the deposition of Horatio Chreisman, offered by the plaintiff, forms the ground of the 2d and 3d exceptions.

This witness had been surveyor as principal or deputy of Austin's colony from the year 1823 until the annexation of Texas.

He was examined as to the boundaries of this four league grant, made in 1831, in a new and sparsely populated country. His deposition was taken in January, 1875, two years before the trial of the cause.

Attention is called to the 10th direct interrogatory. "State, if you know, * * * what the location of the upper line of the Basquez four league tract is, with reference to the upper line of the said reserve. Are any of the lines of said four league survey coincident or concurrent with any of the lines of said reserve? * * * (p. 2, return to *certiorari*.)

To meet the case, should the witness answer that the upper line of the Basquez tract was coincident with the upper line of the reserve? The defendant in his 10th cross-interrogatory asks: "Do you know anything of the representation on the old maps of said reserve of about 2,000 varas space between the upper line of the Basquez survey and the upper line of said reserve? Explain why the maps show this 2,000 varas space. (p. 4.)

This cross-interrogatory is thus answered: "I know nothing of any such representation on the old maps of 2,000 varas space between the upper line of the Basquez and the upper line of said reserve. I never saw any map which shows the said space until I received a certified copy of a map from Austin, sent me by Terrell & Walker, attorneys for defendants, in which that space was placed between the upper line of the Basquez and said reserve, and it is impossible for me to explain why this space is placed above the upper line instead of below it, where I am well satisfied it should be. (p. .)

The 19th direct, which is specially excepted to, is as follows:

"Did you, at any time or place, in any conversation with William Moore, hear him speak of the Basquez four league

survey. * * * If yea state what he said, and at what time and place?"

This was thus crossed.

"If the map and field-work were based from information derived from Moore, do they correctly represent the information and directions given you by him?"

Return to Certiorari, pp. 3, 6.

It is to be remembered that Moore and the witness were deputy surveyors under Johnson, engaged at the time when the conversation occured, in surveying the Austin & Williams Reserve.

As already stated, the deposition of this witness was taken two years before the trial.

Not only were no objections taken to the direct interrogotaries, but, as we have said, the witnesses was cross-examined as to the very matter of hearsay, which forms the ground of the present exception.

More than this; with ample opportunity as to time before the trial, no motion was made to suppress the deposition.

To permit such an exception to prevail, would not only be unjust to the plaintiffs, but would give undue advantage to the defendant acquiescing in the question, admitting the answer if favorable to him, and rejecting it if against his interest.

A deposition is governed by the same principles applicable to the examination of a witness *viva voce*. The objection must be to the question, and cannot be made to the answer when it is responsive to the question.

Schutte vs. *Thompson*, 15 Wall., 158;
Doane vs. *Glen*, 21 Wall., 35.

Independent of this, the evidence related to an ancient boundary, and the information of witness was derived from the official surveyor, who was dead when the deposition was

taken, and was obtained at a time not suspicious; that is to say, when no contest existed as to the boundary in question.

Two reports of survey made under order of the court were admitted in evidence; the first dated in 1869, in the case entitled *J. C. Poole* vs. *C. Jones*, the second, in 1857, in the case of *Angelina E. Eberly*, (wife of J. C. Peyton) *et al vs. James Marlin.*

These surveys were also introduced to show the Basquez boundary. The first was made by W. S. Hunnicut and other surveyors, who verified their report by certifying, after having been duly sworn, "that the said report is true and correct according to their opinion as scientific surveyors." (p. 43.)

The second survey was made by Hunnicut alone, who certifies as to its correctness as "deputy surveyor for Robertson's land district."

Hunnicut is a defendant in this suit.

Other defendants claim title under C. Jones and James Marlin, who were parties to the two suits in which these surveys were made.

It does not appear that *the first* of these surveys was excepted to; but, admitting that both were, the evidence was competent as the solemn statement in his official capacity of a defendent in the suit, and made under order of the court the causes involving the title, to which other defendants in this suit were parties.

The fifth exception arises on the refusal of the court to charge that the title of Sanchez, set up by some of the defendants, was superior to that of the plaintiffs. The charge given is, "that if the plaintiffs have been able to identify the land which the Basquez title purports to convey, then this title is the older and the better one."

The Sanchez title being junior to that of Basquez, and both having a common origin, the elder must prevail.

Sanchez in October, 1833, in his petition, recites, he had acquired permission to purchase five leagues on 20 December, 1830, and asks that these may be so divided as that he may have one and a quarter leagues on the left bank of the Brazos, between *the lands surveyed for Gregorio Basquez* and Atanacio de la Serda, one and a quarter on the opposite bank in front of the first mentioned, and two and half leagues on Davidson's Creek, &c. (p. 54.)

The report of the survey is without date, but follows the above description "one and a quarter leagues on the left bank of the Brazos, between the lands surveyed for Gregorio Basquez and Antonio de la Serda."

The sixth exception relates to the statute of limitations.

Some of the defendants claimed under one, John Marlin, who, in 1835, received as a colonist in Leftwick's colony a grant of a league of land. It was claimed that a part of this league interfered with the boundary of the Basquez grant as asserted by the plaintiffs. The said defendant, as to this, set up the statute of limitations of three years.

The court charged the jury: "The plaintiffs claim that in May, 1857, before the defendants had been in possession for three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basquez grant by *James* Marlin, as the agent of Mrs. Eberly, claiming title to the whole in her name. If you find this to be true, then we instruct you that from that time the possession of the defendant, they holding under a junior title, was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper title. (p. 61.)

The elder title cannot be defeated by the junior except by actual possession for the period prescribed by the statute."

The principle is well settled that, where there is a conflict of title and possession, the constructive actual seizin of all the lands not in the actual adverse possession and occupancy of the other is in the party having the better title.

Lessee of Clark vs. *Courtney*, 5 Pet., 355;
Ledyard vs. *Brown*, 27 Texas, 367.

In *White* vs. *Burnley*, the defendants, with junior title, had been in possession more than three years before the suit was commenced, but no one had been in *actual* possession of the disputed part for three years when the action was instituted.

The court said it was too plain to make plainer, that until the land of the plaintiff was trespassed upon, the action of trespass to try title could not be maintained.

20 How., 251.

To support the seventh exception the bill cites the evidence, which extends from pp. 61 to 88, upon which the charge is asked.

"If you believe, from the evidence, that at the date of the purchase by Churchill Jones from John Marlin, in 1853, the said Jones had no notice by the the county maps or other records, or otherwise, of any conflict of the John Marlin league with the Basquez grant, you must find for the defendants, Watson and children, Bartlett and wife, and W. H. Jones, even if you should find that the location, as claimed by the plaintiffs, is the true location of the Basquez grant."

The court refused this, and charged "that if the jury were satisfied, from the evidence, that the original testimonio of the plaintiffs' title had been recorded in the county where the lands in controversy were situated, and the tract purporting to be conveyed by said testimonio had been actually run upon the ground, the defendants could

60 N 6
10 Pet 444

not claim, as purchasers in good faith, without notice." (p. 88.)

In the charge of the court it is stated that the plaintiffs had offered evidence to show the boundary by the common understanding and reputation of the neighborhood, where the lands lie, formed before any controversy about the lines.

That Johnson, the principal surveyor of the colony, had made a rough map, of which two copies had been made, which showed that the upper Basquez and the reserve lines were identical, and that these, if now in existence, would be accurate maps.

Under the circumstances of the case, the court correctly charged that the claimants under the Martin league were not purchases in good faith without notice.

In *Comm.* vs. *Penn.*, Mr. Justice WASHINGTON said that when the reputation of the neighborhood had assigned to the tract of land, boundaries different from those delineated on the survey, a subsequent locator is so far affected by notice of the real boundaries that a claimant under him cannot, even in a court of equity, have his posterior equitable title against the legal or equitable title of the first locator. In short, cannot assert that he was purchaser, without notice, in face of strong evidence to the contrary.

1 Pet. C. C., 496.

So in *Ledyard* vs. *Brown*, it is held that a colonist grant in Austin Colony dated in 1835, when its boundary conflicts with a colonist grant in De Witt's Colony made in 1837—will prevail, though it should appear that it was located a few miles within the De Witt colony.

27 Tex., 393.

We conclude by giving the principles asserted in the case of *Comm.* vs. *Penn*, already cited, and in *Wilder* vs. *Carroll*, 29 Tex., 333, as governing nearly all that is material in the consideration of this cause.

4 Cowen 682 and
4 Pet 140

In the former case it is ruled:

Reputed boundaries are often proved by the testimony of aged witnesses; and the hearsay evidence of such witnesses has been permitted to establish such lines in opposition to the calls of an ancient patent.

It is not the line reported, but the lines which have been actually run by the surveyor which vest in a patentee the area included in those lines.

When a mistake of the surveyor in shown, the court looks beyond the patent to correct it.

In the latter case it is said:

If the boundaries between these surveys was run out and marked upon the ground, and its locality can be found by witnesses from their personal knowledge or information, derived from general reputation, or from its having been pointed out by the surveyor by whom it was run, or others who were present and cognizant of the fact, they will fix the position, though there may be a discrepancy between the portion thus ascertained and that given it by the calls of the plat or the grant.

In conclusion we add that where, on the undisputed facts, the verdict is clearly right, the court will not reverse the judgment, because, on some disputed point, a charge may have been given which is technically incorrect.

Walburn vs. *Babbit*, 16 Wall., 577.

P. PHILLIPS,
Of Counsel for Defendant in Error.